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SOME ASPECTS OF BLACKSTONE AND HIS
COMMENTARIES.

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THE main facts of Blackstone's life are well known, and so are the qualities of his Commentaries. I do not intend to add to the number of Blackstone's biographers, nor to give an exhaustive account of his Commentaries. But I must begin by stating shortly some of the salient facts and dates in Blackstone's life in order that my remarks upon some aspects of his Commentaries may be the better understood. Then I shall say something, first, of Blackstone's intellectual characteristics; secondly, of the manner in which these intellectual characteristics have worked together to make the Commentaries a classical book; and, thirdly, of certain alleged defects in the Commentaries.

Blackstone was born on July 10, 1723. He was educated at Charterhouse and Pembroke College, Oxford; and he became a student at the Middle Temple in 1741. The first really notable event in his career was his election as a fellow of All Souls on November 2, 1743. All Souls was then a very close body. Founder's kin had a preference in the elections to fellowships; and, right down to the reforms of the nineteenth century, the fellows were very much a family party. But occasionally there was no candidate from the privileged families, and then merit had its chance. Blackstone was a meritorious outsider; and, in his essay on *Collateral Consanguinity*, he criticized with much force the existing rules as to the preference given to founder's

kin. He did good service to the college as bursar and steward of its manors, and a still more valuable service in completing and arranging the Codrington Library—the great law and history library of the University. In 1751 he was made the assessor, that is, the judge, of the Chancellor's Court. Until 1753 he divided his time between Oxford and London. But he got very little practice in London; and in 1753 he deserted London for Oxford. He had hopes of becoming Regius Professor of Civil Law; but the Duke of Newcastle, not being satisfied with the correctness of his political views, passed him over in favour of a man whose only qualification was the fact that he was the best electioneering agent in the University. That was the most decisive event in Blackstone's career. It was due to it that Murray, the Solicitor-General, the future Lord Mansfield, advised Blackstone to proceed with a project which he had already considered, and to break new ground by giving lectures on English law at Oxford. These lectures, which he began to give in Michaelmas Term, 1753, were the first lectures ever given on English law at any university in the world; they led to his appointment as the first Vinerian professor in 1758; and they were the basis of the Commentaries, which were published between 1765 and 1769.

Professor Blackstone was a famous man at Oxford. He took his share in university business, and was instrumental in rescuing the University Press from the decadent condition into which it had fallen. His lectures spread his fame in the learned world outside the University. In 1759 he returned to London; and in 1761 he became a member of Parliament, and Principal of New Inn Hall, Oxford. In 1762 he deserted Oxford, resigning his professorship and the headship of New Inn Hall. The publication of the Commentaries made him still more famous. In 1770 he was offered and refused the post of Solicitor-General; and in the same year he became a judge.¹ Blackstone died

¹ All Souls has recently come into the possession of a curious little memento of some of Blackstone's activities as a judge. It is a little book, bound in limp leather covers and interleaved with blank leaves, which contains (1) A Geography of Great Britain consisting of a collection of maps of the counties of England, Scotland and Wales, one hundred and fifty-eight descriptions of the routes and distances between different towns, and the names and distances from London of all cities and market towns; and (2) A Description of all the direct and principal cross-roads in Great Britain. Blackstone has added forty-five other routes in his own handwriting, and a list of towns visited on the Western, Oxford, Midland, and Northern circuits. He has also made a few corrections in both books. As the date of publication of the second of these two books is 1772, it may well be that it was used and annotated by him for the purpose of his duties as judge of assize. There are a few notes in another hand. One of these notes is a list of towns visited in the summer of 1795 and the spring of 1796, so that it was obviously at some time after Blackstone's death that the notes in this hand were written.

on February 14, 1780. He was a good judge; but it is on his Commentaries that his fame rests.

I now pass to my first head—the intellectual qualities of their author.

(1) *Blackstone's intellectual characteristics.*

The character of Blackstone's learning, the character of his mind, and the events of his life, united to give him the power to produce the only complete and literary account of the principles of English law that had ever appeared in the course of its long history. Let us look at Blackstone's intellectual characteristics from these three points of view.

Blackstone's learning. Blackstone was a classical scholar, the author of some critical notes on Shakespeare, and himself something of a poet. He won a prize for a poem on Milton; but his best known poem is 'The Lawyer's Farewell to his Muse,' which shows some traces of his early study of Milton. He had therefore laid a firm literary foundation for his later studies in history, politics, and law. It was this literary foundation which helped to produce a literary style of such merit that it extorted a panegyric even from his inveterate enemy Bentham²: 'Correct, elegant, unembarrassed, ornamented, the *style* is such, as could scarce fail to recommend a work still more vicious in point of *matter* to the multitude of readers. He it is, in short, who first of all institutional writers has taught Jurisprudence to speak the language of the Scholar and the Gentleman: put a polish upon that rugged science: cleansed her from the dust and cobwebs of the office: and if he has not enriched her with that precision that is drawn only from the sterling treasury of the sciences, has decked her out, however, to advantage, from the toilette of classic erudition: enlivened her with metaphors and allusions; and sent her abroad in some measure to instruct, and in still greater measure to entertain, the most miscellaneous and even the most fastidious societies.'

But, to turn from the style of the Commentaries to their matter, their excellence is due largely to the fact that Blackstone combined with an accurate knowledge of English law, which he had learned from books and by attendance on the Courts, a knowledge of English history, political theory and Roman law, which he had learned at the University. It was this unique combination of the learning of the English lawyer and university learning which explains the distinctive excellence of the

² Fragment on Government, Preface, p. 116 (Montague's ed.).

Commentaries. The best evidence of the quality of Blackstone's learning in English law is the Commentaries themselves, his Law Tracts, and the reports of his decisions as a judge; and it is well to remember that even Bentham admitted that he was generally accurate in his statements of the law.³ The best evidence of the range of his university studies, and of his capacity to assimilate the essence of the books which he had read, is the list of authorities cited by him in the Commentaries, and the use which he makes of them. It is clear that he had studied the best authorities on all periods of English history, the texts of Roman law, foreign commentaries on Roman law, writers on international law and jurisprudence, and the works of such political thinkers as Locke, Montesquieu, Burlamaqui, and Beccaria.

As we shall now see, the character of Blackstone's mind enabled him to turn his literary gifts and his wide range of learning to the best account.

The character of Blackstone's mind. Two words describe the leading characteristics of Blackstone's mind—order and system. These characteristics appear both in his active life and his literary work—the literary style was an index to the character of the man. As illustrations of the display of these characteristics of Blackstone's mind I shall take some of his achievements at All Souls and in the University of Oxford. We shall see that they help to explain the effectiveness of all his literary work—his shorter tracts as well as the Commentaries.

We have seen that Blackstone had filled at All Souls the position of steward of the manors of the college and of bursar. The late Professor Montague Burrows has told us that during the ten years that he was steward of the manors of the college he 'applied his legal mind to the examination of all the documents bearing on the college property, and rearranged its archives.'⁴ Of his terms of office as bursar he has left us a memento in the shape of a 'Dissertation on the Accounts of All Souls College.'⁵ It was addressed to his successor as bursar; and, as Sir William Anson says, 'it exhibits to the full the orderly character of Blackstone's intellect, and the dignified suavity of his style.' In it Blackstone tells us that he had 'been very early engaged in' the financial side of college business, and 'continued for a considerable time, either as an

³ C. W. Everett's ed. of Bentham's Comment on the Commentaries, 147.

⁴ Worthies of All Souls, 400.

⁵ Printed in the publications of the Roxburgh Club with a preface by Sir William Anson.

accomptant, an assistant, or an auditor.’⁶ The thoroughness of the work which he did in connexion with the college estates is illustrated by another statement in the same tract: ‘In the year 1747 I remember to have compared all the leases then subsisting with the rentals and to have corrected a great many mistakes; most of them to the disadvantage of the College (for the tenants will take care of themselves) and some of them of near seventy years standing.’⁷ His work on the Codrington Library was as conscientious and as solid. In 1710 Codrington had left £10,000 and £6,000 worth of books to build and endow a library. The foundation stone had been laid in 1716. But, for some years before Blackstone’s election to All Souls, the work on the library had come to a standstill. On its completion and arrangement Blackstone spent many years of work. ‘To him,’ says the late Professor Montague Burrows, ‘the library owes the excellent arrangements which distinguish it to the present day. By judicious management Codrington’s £10,000 was increased to £12,000, and an endowment was formed for the future increase and care of the books out of the surplus left when the building was completed.’⁸ Bacon’s statue of Blackstone, a statue so remarkable for the life-like expression of the face that we must suppose that the sculptor knew Blackstone personally, is now the chief ornament of the library.

Blackstone’s efforts on behalf of the University Press were no less conspicuous and successful. When he was made a delegate of the Press he found it in an effete condition—‘languishing in a lazy obscurity, and barely reminding us of its existence, by now and then slowly bringing forth a Program, a Sermon printed by request, or at best a Bodleian Catalogue.’⁹ The letter to the Vice-Chancellor, in which he not only entered a protest against this neglect, but also suggested salutary measures of reform, is printed in his law tracts; but the more piquant and personal passages are omitted. It is an excellent specimen both of his literary powers and of his capacity for affairs. Moreover I think that he had a good deal to do with the speedy settlement of the scheme for giving effect to Viner’s will. The provisions of that scheme gave rise to much controversy; and, amongst the numerous pamphlets which it called forth, I think we can trace Blackstone’s hand in some of those which supported it.¹⁰

⁶ At p. 3.

⁷ At p. 42.

⁸ Worthies of All Souls, 389.

⁹ From Blackstone’s original letter to the Vice-Chancellor.

¹⁰ As to this see L. Q. R. xxxix, 26.

All Blackstone's literary works show the capacity for reducing to order and system even the most intractable material, which we see in his active work as bursar and delegate of the Press. It was just the sort of capacity that was needed for a pioneer student's treatise on English law. The material was vast, scattered, and often expressed in too technical a shape to be intelligible to a beginner. It was only a man with an orderly and systematic mind, a man with the sympathetic mind of an historian, a man with great powers of exposition, who could from this material produce a treatise which was comprehensive, clearly arranged, lucid, and literary. In this task he was, I think, helped by the events of his life.

The events of Blackstone's life. I do not think that anyone can produce a really successful book on English law unless he has had some practical experience of the working of the law. Blackstone for many years divided his time between the Courts at Westminster and Oxford. At Oxford his experience as assessor in the Chancellor's Court, as steward of the college manors, and as bursar, gave him much practical experience of different sides of the law; and he took an active part in college and university business. The practical acquaintance with the working of the law, which he thus acquired, helped him to expound legal rules and doctrines with a vividness and a reality which cannot be learned from books. If, as Maitland said, 'law is the place where life and logic meet,' a due proportion of life and logic is needed to make a successful lawyer and a successful law book. Blackstone's career, like Maitland's, was a successful blend of the two; and it helped both men to write law books which were at once recognized as classics. But this brings me to my second head—the manner in which Blackstone's intellectual characteristics have worked together to make the Commentaries a classical book.

(2) *The manner in which Blackstone's intellectual characteristics have worked together to make the Commentaries a classical book.*

It was these intellectual characteristics which made the Commentaries a classical book. Blackstone's great learning, united to his orderly and systematic mind, created out of the heterogeneous mass of material, mediaeval and modern, which made up the body of English law, a great luminous readable treatise on English law as a whole. And this treatise was also the first book of the Institutes of English law which satisfied Bacon's test of what a book of Institutes ought to be—'a key

and a general preparation to the reading of the course,' and 'like a model towards a great building.'¹¹

Littleton's *Tenures*, with which eighteenth century students still began their legal studies, contained much obsolete law, and only touched a part of the subject. Henry Finch's book, written in the first half of the seventeenth century, was, as Blackstone said, 'superior to all that were before extant'; but it was in Blackstone's day largely obsolete.¹² At the beginning of the eighteenth century, the need for a good institutional book was a crying need; and in 1720 Thomas Wood attempted to supply it. His book illustrates the fact that it was only a man who had the literary background, and the systematic and orderly mind of Blackstone, who could completely satisfy this need. Wood's book was not without merits, as Blackstone recognized. 'Upon the whole his work is undoubtedly a valuable performance; and great are the obligations of the student to him, and his predecessor Finch, for their happy progress in reducing the elements of law from their former chaos to a regular methodical science.'¹³ In fact, Wood's book reached a ninth edition in 1763. But Wood was simply an English lawyer; and, as Blackstone says, contented himself with merely enlarging and modernizing Finch's book, so that the reader is 'frequently in the dark with regard to the reason and original of many still subsisting laws which are founded in remote antiquity.'¹⁴ Moreover the book was not well proportioned. 'As in some titles his plan is too contracted, in others also it seems to be too diffuse.'¹⁵ In other words, Wood had none of that supreme literary tact which Dicey rightly singled out as one of the outstanding merits of the *Commentaries*.¹⁶

But I do not think that even these qualities—a wide literary foundation, a systematic and orderly mind, supreme literary tact—would have made the *Commentaries* the literary and legal classic that it is, if it had been written out for publication and straightway printed. It is because the *Commentaries* are the product of some ten years of reflection, and repeated revision, it is because they originated in courses of lectures repeated every year during this period, that they attained that final touch of excellence which entitles them to be called classical. I know from experience that the process of lecturing from a manuscript,

¹¹ Spedding, *Letters and Life*, vi, 70.

¹² Preface to Blackstone's *Analysis of the Law*.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *National Rev.*, liv, 663.

and the consequent need to explain clearly the contents of that manuscript to a class, often reveal obscurities and inconsistencies which no amount of solitary revision will reveal. I think that this process, applied by a man of Blackstone's genius to his work, is the final cause of the excellence of the Commentaries; and, as I do not think that sufficient weight has hitherto been given to it, I shall say something of this stage in the manufacture of the Commentaries.

It was on November 6, 1753, that Blackstone began to lecture on English law at Oxford. The new venture met, Blackstone himself tells us, with a favourable reception.¹⁷ Bentham, though he denounced Blackstone as 'a formal, precise and affected lecturer,' admitted that his lectures were popular, that he attracted from thirty to fifty students, and that his successor failed to draw such large audiences as he drew.¹⁸ But, in order to prepare these lectures, Blackstone found it advisable 'to mark out a plan of the laws of England, so comprehensive, as that every title might be reduced under some one or other of its general heads, which the student might afterwards pursue to any degree of minuteness; and at the same time so contracted, that the gentleman might with tolerable application contemplate and understand the whole.'¹⁹ This plan he eventually published under the title of 'An Analysis of the Laws of England.' It owes most, he tells us, to Hale's analysis; but it was by no means a copy. It was, in fact, an original scheme. This Analysis Blackstone used as the syllabus of his lectures—a syllabus which, as he said, 'is interspersed with a few definitions and general rules, to assist the recollection of such gentlemen as have formerly honoured him with their attendance, or such as may hereafter become his auditors.'²⁰ After the publication of the lectures in the form of the Commentaries, later editions of the Analysis were accommodated to the new form which the lectures had taken.

Blackstone, therefore, from the start, systematically planned his lectures. He gave them as a private lecturer from 1753—1758. In 1758 he was made first Vinerian Professor of English law. His duties as professor were to give one public lecture in each of the four terms in the year, and a course of sixty private lectures, for which private lectures he was entitled to charge a fee. It was these private lectures, which he had formerly given as a private lecturer, which were the basis of the Commentaries.

¹⁷ Preface to his Analysis of the Law.

¹⁸ Works, x, 45.

¹⁹ Preface to his Analysis of the Law.

²⁰ *Ibid.*

Probably he made this the occasion for a revision; but that they were substantially the same can be seen from this fact: Viner's bequest involved the election of Vinerian scholars as well as a Vinerian Professor. These scholars were obliged to attend the Vinerian Professor's lectures. Blackstone tried (without success) to get the University to release from this obligation those Vinerian scholars who had attended the lectures which he had given as a private lecturer. Blackstone continued to give these lectures till he resigned his chair in 1762. In 1761, he said in a letter relative to the appointment of deputies to read his solemn lectures, that, during the three years that he had been professor, he had only appointed a deputy once or twice for his private lectures, and then only for a single lecture. His lectures were thus subjected to a continuous process of polishing from 1753 till 1762. During that period many copies of the lectures were in circulation, and were eagerly prized—so much so that there was reason to fear that some pirate might print them from a defective set of notes. It was for this reason that Blackstone, like Plowden before him, determined to publish them himself. Let us listen to the story in Blackstone's own words²¹: 'The truth is, that the present publication is as much the effect of necessity, as it is of choice. The notes which were taken by his hearers, have by some of them (too partial in his favour) been thought worth revising and transcribing; and these transcripts have been frequently lent to others. Hence copies have been multiplied, in their nature imperfect, if not erroneous; some of which have fallen into mercenary hands, and become the object of clandestine sale. Having therefore so much reason to apprehend a surreptitious impression, he chose rather to submit his own errors to the world, than to seem answerable for those of other men.' Both law and letters owe something to these 'mercenary hands'; for, in an earlier part of his Preface, Blackstone tells us that he was hesitant as to whether he would not best consult his reputation by 'a total suppression of his lectures.'

Now the interesting question arises: What were these lectures like, and how did they compare with the printed text of the *Commentaries* which was based on them?

I have seen three MSS. of these lectures. The first of these is a transcript of the lectures of 1753—the first course which Blackstone ever gave. It is in the library of the Law Society, and it was taken by Thomas Bever. Bever was a member of Oriel College, Oxford, and was elected Fellow of All Souls in 1753. He became an advocate of Doctors' Commons, Judge of

²¹ Preface to the 1st ed. of the *Commentaries*.

the Cinque Ports, and Chancellor of the dioceses of Lincoln and Bangor. In 1762 he lectured for the Regius Professor of Civil Law in Oxford, and published, in 1766, his introduction to his lectures, under the title of 'A Discourse on the Study of Jurisprudence and on the Civil Law.' He also published in 1781 a work on the Roman State and Roman laws. Bever was thus a man of some mark in his day. His transcript is contained in two folio volumes, and these volumes are obviously a fair copy of rough notes. It is a careful set of notes with full references to the authorities cited by the lecturer.

The second is also in the Law Society's library; and it claims to be Blackstone's own copy written out by himself. A note at the beginning of the volumes, signed by the donor, J. D. Blake, and dated July 28, 1832, contains the following statement: 'This and the accompanying three volumes contain Mr. Justice Blackstone's MS. of the lectures originally delivered by him. They were shown by me to the late Mr. Cook, formerly clerk to Judge Blackstone (afterwards to Mr. Justice Buller), and declared by Cook to be in the handwriting of Judge Blackstone.' I do not think that this claim can be substantiated for the following reasons: (1) I think the lectures are written out in two hands; and the hand most like Blackstone's exhibits important differences from his handwriting. (2) The notes are short and sometimes scrappy. They are far less in bulk than the other two MSS. They look as if they were taken by a student who got down as much as he could in longhand. (3) Internal evidence is against the view that they are Blackstone's own notes. At one point there is a reference to a tract on descents by William Blackstone, Esq.—this is hardly the way in which Blackstone would refer to his own work. At another point there is a reference to the plea *nul tiel record*. It is written *nul record*—clearly the auditor had missed the second word.²² Then, what are we to make of the following sentence?—'The former part of this lecture must be taken out of the analysis and its deficiencies supplied by Wood. It seems indeed to contain nothing of great importance, except the distinction between courts of record and not of record.'²³ I think that the MS. is a fair copy of notes taken by a student in the year 1762—for so a note in vol. 2 seems to tell us.

The third of these transcripts is in All Souls College Library. It was made, so a note at the end of the fourth lecture tells us, in 1761-1762.²⁴ It is contained in thirty-five small quarto

²² Vol. 3, Lect. 11.

²³ *Ibid.* Lect. 2.

²⁴ This fourth lecture is said to have been 'read Oct. 17th, 1761.'

volumes. The division into volumes is purely arbitrary. In many cases one volume ends, and the next begins, in the middle of a sentence. The pages are not numbered, but, on an average, there are some eighty pages to a volume. Volumes 23 and 35 have a large number of blank pages. The hand is clear and legible; and the text at one or two points has been amended by another hand; but these emendations are generally trivial. I should imagine that the MS. was a transcript from a good shorthand note, as the lectures, assuming they were lectures of an hour each, are too long to allow them to be taken down in longhand. Throughout the Analysis is referred to. The Analysis was evidently used by Blackstone, as he says in his Preface to it, as a syllabus. The manuscript shows that Blackstone followed very faithfully the scheme of his lectures which he published in 1759.²⁵ According to that scheme the rights of persons occupied sixteen lectures delivered between October 10 and November 1; the 'rights of property real' occupied eleven lectures delivered between November 30 and December 17; the 'rights of property personal' occupied six lectures delivered between January 14 and 22; private wrongs occupied fourteen lectures delivered between February 14 and March 6; and public wrongs occupied thirteen lectures delivered between March 8 and 29—in all sixty lectures. In this manuscript the later lectures are not always very clearly divided; but I think that they work out at rather more than sixty lectures—public wrongs seem to have occupied sixteen lectures. It is possible that some of the lectures were either delivered in two parts,²⁶ or that they lasted for considerably more than one hour.

The Commentaries follow the lectures very closely. But there are one or two places in which the manuscript contains matter not in the Commentaries. The three most striking instances are the following:

(1) In vol. 13, when Blackstone is dealing with bills of exchange and promissory notes, he explains that the assignability of these instruments is due to the custom of the merchants, and says that 'in England such custom in cases of commerce is sufficient warranty, so that the knowledge of these things would be much easier learnt on the royal exchange than in the courts of Westminster Hall.' This remark does not occur in the corresponding chapter of the Commentaries (Book II, chap. 30). And I think that the explanation is obvious. When the lectures were first written (1752) Mansfield had not yet become chief

²⁵ L. Q. R. xxxix, 45.

²⁶ See Vols. 16 and 17.

justice of the King's Bench. When the Commentaries were published in 1765 he had been nine years on the bench. Buller J. tells us in a well-known passage in his judgment in *Lickbarrow v. Mason*²⁷ that before Lord Mansfield's time, 'all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle'; but that, after Lord Mansfield's time, 'the great study has been to find some certain general principles.' Thus Blackstone's statement in his lectures, and the omission of the statement in the Commentaries, are a striking confirmation of the accuracy of Buller's remarks.

(2) Mansfield's influence did not stop here. I have pointed out in an article in the *Harvard Law Review*²⁸ that Blackstone's treatment of equity in his lectures is wholly different from his treatment of equity in the Commentaries; and that this difference is due to the fact that he had accepted Mansfield's views as to the essential unity of the rules of law and equity. His treatment of equity in his Commentaries²⁹ is, in substance, a literary summary of Mansfield's views. But since the views of Mansfield and Blackstone on this topic were rejected by their successors, they have attracted comparatively little attention. Similarly, in the lectures, there is no hint of the peculiar views which Mansfield held as to the doctrine of consideration; but in the Commentaries these views are substantially reproduced.³⁰

(3) At the end of the manuscript Blackstone gives some advice to students of the law as to books and other methods of attaining a knowledge of the law. The passage runs as follows: 'Give me leave to subjoin a little advice with a list of law books proper to be read by every gentleman after he has attended this course—viz. Finch Law—Wood's Institutes—Wright's Tenures—Duncomb's Tryal per pais—Hale's and Hawkins' Pleas of the Crown—Burn's Justice—and such as have leisure and inclination—Fitzherbert's Natura Brevium—Bacon's Abridgment—Gilbert, Equity Cases Abridged—Coke, Strange, Raymond, Vaughan and Peere Williams's Reports. But the student who makes the law his profession must attend to such books as treat of that part of the law which was laid down in the 2nd and 3rd parts of this course of lectures—viz. the rights of property and the redress of civil injuries. He must study Littleton's Tenures, first by itself and then with Lord Coke's Commentary; and though he will there find much antiquated learning mixed with what is now in

²⁷ (1787) 2 T. R. at p. 73.

²⁸ Harv. Law. Rev. xliii, 1—32.

²⁹ Comm. iii, 429—42.

³⁰ *Ibid.* ii, 445—6.

use, Hawkins's Abridgment of Coke and Littleton will distinguish the obsolete from the modern, and Gilbert's Tenures will explain the reasons of both. When he attends the courts at Westminster (where he should stay till the rising of the court, when matters of common practice generally arise) he had better defer taking notes for at least the first term, or till he knows what particular parts of the case [*sic*]. He must read the best reports and the most useful statutes at large—having in his mind a general map of the country he will not be a long time bewildered in the minuter districts—or take Viner's Abridgment setting out in his tract, his own judgment and sagacity will be the best guide to direct his future studies [*sic*].' It should be noted that a shorter form of this note occurs in Bever's transcript; but it is absent in the set of notes which claim to be Blackstone's own.

The grammar at the end of this passage is dubious, but the meaning is reasonably clear. The advice given to the student is not unlike that given in Roger North's Discourse on the Study of the Laws, which was probably written at the end of the seventeenth century. Indeed, at the time when Blackstone wrote, he was the only public teacher of English law in existence, so that the reading of books and attendance on the Courts were the only ways in which a student could learn his law.

These facts, I think, show that the Commentaries owe something not only to Blackstone's wide learning and great literary gifts, but also to the fact that they were based on lectures delivered and, no doubt, corrected year by year for the space of ten years.

I now pass to my third head—a consideration of certain alleged defects in the Commentaries.

(3) *The alleged defects in the Commentaries.*

The two main criticisms which have been made on the Commentaries are, first, that Blackstone is an indiscriminate apologist for all things established, and secondly that, as a political and jurisprudential thinker, he is weak and confused. I do not deny that there is some truth in both these criticisms. But I think that there is less truth in them than is sometimes supposed. I think that both these defects are due largely to the intellectual outlook of the period when the Commentaries were written; and that the character of the succeeding period has caused them to be very much exaggerated.

First, it is said that Blackstone is an indiscriminate apologist for all things established. That was the burthen of Bentham's criticism and condemnation. There is certainly an element of

truth in this accusation. One glaring instance is his justification of the law as to benefit of clergy as it stood in his day.³¹ But it is less true than is sometimes supposed. Even Bentham was forced to admit that 'the dark side of the picture was not left wholly untouched.' He cannot, however, refrain from adding the silly sarcasm that the critical passages in the Commentaries were probably by another hand—'One would think some Angel had been sowing wheat among our Author's tares.'³² In fact Blackstone at many points criticizes things established. In his inaugural lecture he says that one reason for the academic study of the law is the possibility that professors might be able to suggest improvements, which would not occur to busy practitioners.³³ And in the course of his Commentaries he criticizes the game laws,³⁴ the doctrine that a felon's blood was corrupted,³⁵ the poor law,³⁶ the law of inheritance,³⁷ and the frequency with which capital punishment was inflicted.³⁸ He also criticized the conflicting character of the rules of law and equity—'there cannot be a greater solecism, than that in two sovereign independent Courts established in the same country, exercising concurrent jurisdiction, and over the same subject-matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other.'³⁹ He was inclined to favour the project of a general register of deeds and wills.⁴⁰ We have seen that in the University of Oxford he advocated and carried through a reform of the University Press; and, at the latter part of his life, he pushed forward schemes of prison reform. Last but not least he condemned the absence of any proper provision for legal education, and advocated that system of university teaching of law which prevails to-day⁴¹—a system to which, as Dicey showed in his valedictory lecture on Blackstone,⁴² both English law and the literature of English law owe a very large debt.

Blackstone's mental attitude was, in fact, the mental attitude of many representative Englishmen in the eighteenth century. Many representative Englishmen in that century were proud,

³¹ Comm. iv, 376.

³² Fragment on Government (Montague's ed.) 123.

³³ Comm. i, 30.

³⁴ *Ibid.* iv, 416.

³⁵ *Ibid.* ii, 256.

³⁶ *Ibid.* i, 365.

³⁷ *Ibid.* ii, 233.

³⁸ *Ibid.* iv, 10, 18, 239.

³⁹ *Ibid.* iii, 441.

⁴⁰ *Ibid.* ii, 342—3.

⁴¹ *Ibid.* i, 26—34.

⁴² National Rev., liv.

and rightly proud, of English institutions and English law. Was not England the one State in Europe where the law was supreme, and the liberty of the subject was protected? Had not English institutions and English law won the praise of such representative foreigners as Montesquieu and Voltaire? And, because Englishmen were proud of their institutions and their law, they were not averse to an intelligent criticism of tendencies which seemed to them to be evil, or of practical abuses which they had observed. A remarkable passage at the end of the eighth chapter of the first Book of Commentaries⁴³ might (if chronology permitted) be taken to be a sermon on the text of Burke's famous *dictum* that 'the power of the Crown, almost dead and rotten as Prerogative, has grown up anew, with much more strength, and far less odium, under the name of Influence.'⁴⁴ Indeed, in one very important matter Blackstone went even further than Burke was ever prepared to go—he admitted the need for some measure of Parliamentary reform.⁴⁵ These eighteenth century statesmen and lawyers were no worshippers of antiquity. In fact they were inclined to despise past ages as 'Gothic' and barbarous by comparison with the enlightened age in which they lived. It was this intelligent satisfaction with the present, which Blackstone shared with many leaders of thought in his days, that has given rise to exaggerated views as to his indiscriminate optimism and conservatism.

But this attitude of mind is obviously better suited to a static age than to an age of change. When things are, on the whole, going well, when the nation is as a whole content with its law and government, received views on fundamental questions can and will be accepted without any very rigid analysis. The Revolution settlement, and its theoretical justification by Locke, satisfied many minds. But, at the end of Blackstone's life, the age was ceasing to be static. Both in England and abroad, there were signs of coming changes. In England new economic ideas, and the progress of the industrial revolution, were making changes necessary. It was this need for changes, it was the feeling that the older statesmen and thinkers, who lived in an atmosphere of intellectual contentment with things established, were incapable of making them, which inspired a new criticism of the premises of the received political and legal ideas. In the

⁴³ Comm. i, 335—7.

⁴⁴ Present Discordants, Works (Bohn's ed.) i, 313.

⁴⁵ 'If any alteration might be wished or suggested in the present frame of Parliaments, it should be in favour of a more complete representation of the people': Comm. i, 172; cf. *ibid.* i, 174, where he says: 'The misfortune is that the deserted boroughs continued to be summoned.'

sphere of legislation and jurisprudence Bentham was the intellectual leader of this party. His hostility to Blackstone dated, he tells us, from 1763 when he had listened to Blackstone's lectures at Oxford—'I, too, heard the lectures; age, sixteen; and even then, no small part of them with rebel ears.'⁴⁶ That hostility, which became more bitter as he became older, is, I think, the main cause for exaggerated views as to Blackstone's optimism and conservatism. It was he who gibbeted Blackstone as the enemy of all reform; and, as we shall now see, it was he who convinced many that, as a political and jurisprudential thinker, Blackstone was weak and confused.

Secondly, it is said that, as a political and jurisprudential thinker, Blackstone is weak and confused. Bentham's *Fragment on Government* was, as Bentham truly said, 'The very first publication by which men at large were invited to break loose from the trammels of authority and ancestor wisdom on the field of law.'⁴⁷ It is a detailed criticism of Blackstone's account of the origin of governments, contained in the section of his Introduction entitled 'The Nature of Laws in General.' It was published anonymously; and its literary qualities were such that, as Bentham says, 'more than one father was found for it: each of the very first class . . . Lord Mansfield, Lord Camden and Mr. Dunning.'⁴⁸ It made Bentham famous; and Dicey has said that, 'among men of thought Blackstone's reputation as a profound jurist never recovered the blow struck at him by the *Fragment on Government*.'⁴⁹

The *Fragment on Government* was originally a part of a larger work entitled 'A Comment on the Commentaries.' But it was so separate a part that Bentham detached it, and published it as a separate tract. The larger work, from which the *Fragment on Government* was detached, has recently been printed with a valuable introduction by Mr. Everett. It exhibits all the well-known characteristics of Bentham's writings—his insistence on the principle of utility,⁵⁰ his preference for enacted law,⁵¹ his advocacy of codification,⁵² his want of historical sense,⁵³ his inclination to ascribe to the knavery of lawyers rules for which there was a sound historical explanation.⁵⁴ And it

⁴⁶ Works, i, 249.

⁴⁷ Note in Bentham's own copy of the work, Works, i, 260, note.

⁴⁸ *Fragment*, Pref. to the 2nd ed., Works, i, 240.

⁴⁹ National Rev. liv, 657.

⁵⁰ A Comment on the Commentaries, 27—8, 192.

⁵¹ *Ibid.* 125—6.

⁵² *Ibid.* 143.

⁵³ *Ibid.* 160—1, 216.

⁵⁴ *Ibid.* 162, 169, 181.

may be noted that his dislike of case law, and his early admiration for Lord Mansfield,⁵⁵ have led him to introduce a remarkable paragraph, which I am sure that Mr. Everett is right in thinking refers to Lord Mansfield's attempts to reform settled rules and doctrines of English law by judicial decision.⁵⁶ 'Should there be a judge,' he says,⁵⁷ 'who, enlightened by genius, stimulated by honest zeal to the work of reformation, sick of the caprice, the delays, the prejudices, the ignorance, the malice, the fickleness, the suspicious ingratitude of popular assemblies, should seek with his sole hand to expunge the effusions of traditionary imbecility, and write down in their room the dictates of pure and native justice, let him but reflect that partial amendment is bought at the expense of universal certainty; that partial good thus purchased is universal evil; and that amendment from the Judgment seat is confusion.' This is sound criticism; and at other points there is acute criticism of undoubted defects in English law,⁵⁸ and of inconsistencies in Blackstone's statements of the law.⁵⁹ On the other hand, some of his criticisms are captious and savour of the special pleader.⁶⁰ On the whole the *Comment on the Commentaries* is a book more especially for lawyers. For that reason I think that Bentham acted wisely in detaching and publishing separately his *Fragment on Government*. The subject-matter of the *Fragment* appealed to a wider audience, and Blackstone's treatment of it laid him open to more obvious criticism.

I think, however, that it may be maintained that, in spite of Bentham's criticism in the *Fragment* and in the *Comment on the Commentaries*, and in spite of Dicey's partial approval of the former criticism, there is more to be said for Blackstone's views than is commonly supposed. Just as Blackstone's intellectual standpoint can be explained by the character of the age in which the *Commentaries* were written, so Bentham's criticism can be explained by the character of that succeeding age of

⁵⁵ 'From the first morning on which I took my seat on one of the hired boards, that slid from under the officers' seats in the area of the King's Bench . . . at the head of the gods of my idolatry, had sitten the Lord Chief Justice': Works, i, 247.

⁵⁶ A *Comment on the Commentaries*, 24; probably the passage refers more especially to Mansfield's attempt to bring about a fusion between the rules of law and equity, Harv. Law Rev. xliii, 20.

⁵⁷ A *Comment on the Commentaries*, 214.

⁵⁸ E.g. *ibid.* 237—the law as to the right to light.

⁵⁹ *Ibid.* 80, 129.

⁶⁰ A *Comment on the Commentaries*, 108—9, 230—1; we can see the same qualities in his criticisms in the *Fragment on Government*—e.g. he praises de Lolme for saying substantially the same things about the merits of the English constitution as he had ridiculed when they were said by Blackstone, see L. Q. R. xlv, 447, n. 15.

which, from many points of view, he was the intellectual fore-runner. The intellectual outlook of the two ages was very different. Both had their strong and their weak points; and the two men who represented these two very different points of view both saw much to which the other was blind.

In many countries in Europe at the latter part of the eighteenth century, dissatisfaction with existing institutions was producing new theories of law and government, and projects of reform. One of the pioneer treatises in the field of law was Beccaria's. It is true that there was not the same dissatisfaction with English law and government as there was in many of the European States. Even Bentham admitted that the government of England was, in spite of all its imperfections, 'the finest and most excellent of any the world ever yet saw.'⁶¹ But we have seen that, even in England, it was becoming clear to some that large reforms were needed; and the intellectual attitude of men like Burke and Blackstone, though not hostile to all reform, was not favourable to reform on a large scale. Bentham tells us that, 'some time after the appearance of the *Fragment* (1776), the House of Commons was found to contain a small knot of young men, in whose minds a disposition to contribute to the improvement of the law had begun to manifest itself.'⁶² But on what principle were these reforms to be made? Bentham was ready with an answer—the principle of utility. That principle, applied by a sovereign legislature, was to be the principle which was to settle both what reforms were needed and how they were to be made. The application of this principle in this way to existing institutions, and to the reasoning by which, in Blackstone's *Commentaries*, those institutions were supported, led to some surprising conclusions. Shelburne,⁶³ and others who admired the *Fragment on Government*, could not help seeing that here was a principle which could be used as a guide to suggest and to justify changes which must sooner or later be made if the law and institutions of England were to be brought into conformity with the new conditions which were rapidly arising. They had, moreover, all the eighteenth century appreciation of the piquancy of Bentham's trenchant attack upon a man of Blackstone's eminence and reputation. Naturally in the succeeding age of sweeping law reforms, which were inspired by many of Bentham's ideas, Bentham's demonstration of the confused character of Blackstone's political reasonings

⁶¹ A Comment on the *Commentaries*, 211.

⁶² Preface to the 2nd ed. of the *Fragment*, Works, i, 241.

⁶³ For Shelburne's early interest in Bentham and his books, see Bentham's Works, i, 248—9, 252.

seemed to be too clear for argument. The current view, the view which Dicey almost seems to accept, is well stated by M. Glasson⁶⁴: 'The philosophical part of Blackstone's work is confused and obscure. While accepting the theory of natural law in the sense in which Grotius had understood it, he sometimes seems to make some approach to the doctrines which deny or alter this superior and immutable law. . . . We can read in the first chapters of the Commentaries the doctrines of Grotius: he has copied them word for word from Burlamaqui. The theory of Locke, which derives law from the social contract, and that of Hobbes which has for its object the denial of natural right, do not induce him to abandon the doctrines of Grotius, though they had long divided English political thinkers into hostile camps.'

But is it fair to Blackstone to test his work in this way? Blackstone was sketching a picture of the evolution of the English constitution, and of its salient features as it existed in his day. That picture owed much to the works of political philosophers, English and foreign—to Hobbes and Locke, to Montesquieu, Grotius, Puffendorff, Beccaria, and Burlamaqui. Blackstone, with much skill and literary tact, used their books to explain the history and present state of the English constitution. Rightly and naturally, he refused to follow all their theories. He had read and mastered this philosophical learning; but he was not mastered by it.⁶⁵ If he had been mastered by it he could not have painted a picture of the complex English constitution which was substantially in accordance with the facts; for, if the facts are not logical, and are not capable of explanation on any one theory, a truthful exposition of the facts must reflect something of their inconsequence. To apply to an historical sketch of that kind an analysis based on the principle of utility and the doctrine of sovereignty, is both unreasonable and misplaced. Such a criticism was able to afford abundant opportunities for condemnation; but, like Hobbes's criticism on Coke,⁶⁶ it was unfair, because it approached the subject from a point of view totally different from that of the work criticized. In Blackstone's day, as in Coke's day, the British constitution and English law were a mosaic of enactments and customs and conventions, which, because they came from all periods of English history, represented divergent ideas

⁶⁴ *Histoire de Droit et des Institutions de L'Angleterre*, v, 398—9.

⁶⁵ As M. Dunoyer says, Blackstone et Pothier, 88: 'Blackstone ne suivit aucun de ses auteurs dans la plénitude de leurs systèmes, il leurs empruntâ seulement quelques idées éparses.'

⁶⁶ Holdsworth, *Hist. Eng. Law*, v, 481—2.

taken from many periods of that history. It contained many ideas which could not be easily reconciled with the modern doctrine of sovereignty; and utility was only one of the many principles on which it was based. But we should note that, because it was a law of this character, it was eminently adaptable to different circumstances and to different ideas. The fact that, while accepting the doctrine of sovereignty, it did not accept all its logical implications, was I think a virtue rather than a vice; and that it refused to pin itself down to the principle of utility as expounded by Bentham, shows that the spirit of its rules was informed by a far wider knowledge of human nature than Bentham ever possessed.

The best illustration of this characteristic of Blackstone's work is his attitude to Montesquieu's famous theory of the separation of powers. It was obvious to many statesmen and political thinkers of the late seventeenth and eighteenth centuries that the legislative executive and judicial powers in the English constitution were divided, and that the organs of government to which these powers were entrusted operated as a check upon one another.⁶⁷ But it was equally obvious that there was no clear-cut division of these functions of government as between the different organs of government. Both in the case of the central government, and still more in the case of the local government, the lines of division were blurred. In the sphere of central government, the Crown—the executive power in the constitution—had a limited power to issue proclamations, which, to a small extent, blurred the separation between the executive and the legislative power; and the Crown was and still is a necessary part of the Legislature, without whose assent no law can be made. The House of Lords was and still is a part of the judicial as well as of the legislative machinery of the State. Some of the privileges of the House of Commons gave and still give it some of the characteristics of a Court of law. The Courts, by means of the prerogative writs, exercised and still exercise an administrative control, under judicial forms, over all subordinate jurisdictions, amongst which was then included the whole machinery of local government. In the sphere of local government the line between these different functions of government was not merely blurred, it was intermingled. Quarter and petty sessions, in town and country alike, exercised legislative, executive and judicial functions.

Yet there is a sense in which there was a separation of powers in the organs of government central and local. These

⁶⁷ See an article by myself in *L. Q. R.* xlv, 445—6.

organs of government—the Crown, the House of Lords, the House of Commons, the Courts of common law, the justices of the peace in quarter and petty sessions—were all to a large extent autonomous bodies, subject only to the control of the legislative power of Parliament, and to the judicial control of the law as interpreted by the Courts. The eighteenth century constitution was made up of a number of autonomous organs, each of which acted as a check upon the others, and prevented the others from using their large, and often undifferentiated, powers tyrannically. It is in this sense that it is true to say that there was a separation of powers in the eighteenth century constitution.

This is something very different from Montesquieu's famous theory of the separation of powers. He deduced from his observation of the English constitution the theory that, without the complete separation of the executive, legislative and judicial powers in the State, constitutional government was impossible.⁶⁸ The contrast between France in which the union of these powers in the king was the dominant note, and England in which the division of these powers between different organs was the dominant note, no doubt led him to make this generalization. But Professor Lévy-Ullmann has pointed out that Montesquieu's generalization will not apply to the English constitution—'England is not the classic country of the separation of powers.'⁶⁹ In fact the English constitution has never squared with this theory, and still less with the different meanings which publicists, both French and American, have put upon it.

Blackstone was well aware of the fact that Montesquieu's theories were not in their entirety applicable to the English constitution. He was equally well aware of the fact that in England the powers of government were more divided than they were in France and other continental monarchies. He uses Montesquieu, but he does not subscribe to the view that his theory of the separation of powers is the sole and sufficient cause for the excellence of the English constitution. He looks at the facts, and finds the cause in the balance of the powers of the separate and autonomous organs of government, and in the control of the

⁶⁸ De L'Esprit des Lois, Bk. XI, Chap. VI : ' Lorsque dans la même personne ou dans le même corps de magistrature la puissance législative est réunie à la puissance exécutive, il n'y a point de liberté, par ce qu'on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement. Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutive.'

⁶⁹ ' Enfin il s'est représenté la brumeuse Angleterre et les Anglais du fond de ses vignes bordelaises sous le clair soleil de sa Gascogne. . . . Non, l'Angleterre n'est pas la patrie classique de la séparation des pouvoirs. Chaque pouvoir y a reçu sa physionomie particulière sans cesser de conserver les traits des autres ' : Le Système Juridique de l'Angleterre, i, 376.

law as interpreted by the Courts. This is clear from the following passage, which sets out a theory of the constitution which is very different from any that can be deduced from Montesquieu ⁷⁰:

‘And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the Legislature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing his conduct (not indeed of the king, which would destroy his constitutional independence; but, which is more beneficial to the public) of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the Crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community.’

In a later passage,⁷¹ it is true, in which the advantages of an independent judiciary are set out, we can see clearer traces of Montesquieu’s influence. But it does not go beyond the facts, and is defective only in failing to note the administrative character of the control which the Court of King’s Bench exercised under judicial forms. It is a noteworthy passage; and, because it is not destitute of some bearing upon some of our modern problems, I shall set it out in full. It runs as follows:

‘In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not

⁷⁰ Comm. i, 154—5.

⁷¹ Comm. i, 269—70.

removable at pleasure, by the crown, consists one main preservation of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over balance for the legislative. For which reason, by the statute 16 Car. 1, c. 10, which abolished the court of star-chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state.'

I think that less than justice has been done to Blackstone's abilities as a political thinker. He was not writing a book upon political science, but a description of the principles of English law public and private. His mentality was, as I have said, typical of the eighteenth century. And there is no doubt that, in the new age which was beginning to open in the last years of that century, that mentality erred on the side of slowness to admit the need for reforms. There is no doubt also that, in the sphere of law reform, Bentham's ideas supplied a necessary stimulus, a creed, and a programme. But the need for that stimulus was to some extent caused by the Tory reaction which was provoked by the excesses of the French Revolution. As we have seen, both Blackstone and Burke were ready to criticize, and to suggest reforms, provided that no attempt was made to undermine the basic principles of the English constitution and English law. Neither showed the blind opposition to all change which characterized Eldon and Ellenborough. Dicey has said that, 'in the ordinary course of things the law of England would have been amended before the end of the eighteenth, or soon after the beginning of the nineteenth century'⁷²; and Bagehot has said that, 'if it had not been for the terror excited throughout Europe by the French Revolution, the old system of parliamentary representation could hardly by possibility have

⁷² *Law and Opinion* (1st ed.) 123.

lasted as long as it did.' ⁷³ But the French Revolution, and the Tory reaction which it caused in England, stopped all chance of reform on these lines. And so, when reform did come, it was a reform which was inspired by the new Whigs who had learned from Bentham, and not by the old Whigs who had learned from Burke. This was the reason why the legend of Blackstone's incompetence as a political and a jurisprudential thinker was perpetuated; and it helped for nearly a century to diminish the fame of the Commentaries.⁷⁴ But these controversies are now a century old. We suffer from other ills than those which oppressed the age to which Bentham spoke; and so we can take a more impartial view of the strong and the weak points of Bentham and Blackstone.

Bentham did great things for English law by helping forward many long-needed reforms. Similarly, Austin helped English lawyers to clarify their ideas upon such fundamental matters as law, sovereignty, rights, and duties. But, even admitting all this, I think that it may be maintained that Blackstone's influence has been more far reaching, and more permanent, than that of Bentham and Austin. In support of this contention I submit the following pleas:—

First, Blackstone summed up, as I have said in my *Sources and Literature of English Law*,⁷⁵ the main principles of the law which were the basis and starting-point of the law reformers of the nineteenth century, so that his work helps us to steer our way through that labyrinth of statutes which have changed the face of English law. Secondly, Blackstone's book was, in the opinion of Maitland and Lord Campbell, the only complete treatise on English law which had appeared since Bracton.⁷⁶ Professor Lévy-Ullmann has pointed out that in France no such complete treatise exists—'Can we find,' he says, 'outside England a work of equal breadth produced by a single author? We know of none' ⁷⁷; and he points out that the fact that so complete a book appeared at this time probably had large effects on the future of English law. Its completeness, he suggests, helped to render unnecessary a general codification of English law. 'Who would say,' he writes, 'that our old lawyers, learned in the customary law, who drew up the civil code, would not

⁷³ Bagehot, *Essays on Parliamentary Reform*, 143.

⁷⁴ Dunoyer, *op. cit.* 91; he adds that, 'c'est parce que Blackstone s'est risqué dans une philosophie du droit, sagement évitée par Pothier, qu'il a manqué perdre en Angleterre une grande partie de son crédit.'

⁷⁵ At pp. 158—9.

⁷⁶ *Ibid.* 155—6.

⁷⁷ *Le Système Juridique de l'Angleterre*, i, 269.

have thought their task useless, if their guide and master Pothier—the French Blackstone—had given our country a complete commentary on the laws of old France?’⁷⁸ Thirdly, it was largely due to the Commentaries that the English common law became also the common law of the United States. It is no small feat to have thus preserved so large a sphere of jurisdiction for the common law, and to have added to the link of a common language the link of common legal principles. Fourthly, Blackstone was, as I have said, the pioneer who suggested that university teaching of law which now flourishes so abundantly in all the countries of the common law.

The school of historical lawyers, which arose in the middle of the nineteenth century, has deprived the school of Bentham and Austin of that sovereign control over legal thought which they exercised earlier in that century.⁷⁹ Men like Maine and Vinogradoff, like Pollock and Maitland, like Holmes, Ames, Thayer and Wigmore, have taught lawyers a larger philosophy of law, which does not disdain the lessons of the past or the wisdom which can be extracted from old law. And so to us Blackstone is not, as Bentham pictures him, the enemy to all reformation, and the inaccurate thinker who used his literary gifts to bolster up established abuses. Rather, he is the literary artist, the historical scholar, and the accomplished lawyer, who has woven into a harmonious texture all the variegated strands which made up the fabric of that English law of the old regime, which, both in England and the United States, is the foundation of the law which governs us to-day.

⁷⁸ *Le Système Juridique de l'Angleterre*, i, 272.

⁷⁹ Holdsworth, *The Historians of Anglo-American Law*, 65—148.

BLACKSTONE'S COMMENTARIES.

The late PROFESSOR A. V. DICEY.

[The following article, which is in substance the inaugural lecture of Professor Dicey, was first published in *The National Review*, vol. liv, pp. 653—675 (December, 1909). By the kind permission of the editor of that journal, we are able to reprint it here as a companion article to that of Professor Sir William Holdsworth. It is an exact copy of the original except for the editorial notes which are marked by square brackets.—ED.]

BLACKSTONE'S *Commentaries on the Laws of England* was on its appearance received with unbounded admiration. It was felt to be a work of untold originality. The author became at once the Great Commentator. In the eyes of his earliest readers he was not only an erudite lawyer and a charming writer, but also a profound jurist. The *Annual Register* for 1767—then edited by Burke—contained a lengthy eulogy of the book. The review may well have been written by Burke himself.

In [the present] situation of things [writes the reviewer] we must owe no trivial obligation to any gentleman of abilities equal to the task, who will take the pains to remove any part of the obscurity in which our system of laws is involved, and thereby contribute to render the whole more intelligible. It will increase this obligation if we reflect, that the law has been looked on, as the most disagreeable of all studies; and of so dry, disgusting, heavy a nature, that students of vivacity and genius were deterred from entering upon it, and those of a quite contrary cast were looked upon as the fittest to encounter the great difficulties which attended a science, which, however excellent in its principles, lay in such a state of rudeness and disorder.

These obligations we owe to Mr. Blackstone, who has entirely cleared the law of England from the rubbish in which it was buried; and now shows it to the public, in a clear, concise, and intelligible form. This masterly writer has not confined himself to discharge the task of a mere jurisconsult; he takes a wider range, and unites the his-

torian and politician with the lawyer. He traces the first establishment of our laws, develops the principles on which they are grounded, examines their propriety and efficacy, and sometimes points out wherein they may be altered for the better.

Lord Mansfield about the same time was asked what books should be recommended to a young man reading for the Bar.

Till of late [he replies] I could never with any satisfaction to myself answer such a question; but since the publication of Mr. Blackstone's *Commentaries*, I can never be at a loss. *There* your son will find analytical reasoning, diffused in a pleasing and perspicuous style. *There* he may inhale imperceptibly the first principles on which our excellent laws are founded; and there he may become acquainted with an uncouth crabbed author, Coke upon Littleton, who has disgusted and disheartened many a Tyro, but who cannot fail to please in the modern attire in which he is now decked out.

As years went by, unstinted praise occasionally gave place to censure bordering even on vituperation. Hear John Austin, who represents the philosophic Radicalism of 1826.

The method observed by Blackstone in his far too celebrated *Commentaries*, is a slavish and blundering copy of the very imperfect method which Hale delineates roughly in his short and unfinished Analysis. From the outset to the end of his *Commentaries*, he blindly adopts the mistakes of his rude and compendious model, missing invariably, with a nice and surprising infelicity, the pregnant but obscure suggestions which it proffered to his attention, and which would have guided a discerning and inventive writer to an arrangement comparatively just. Neither in the general conception, nor in the detail of his book, is there a single particle of original and discriminating thought. He had read somewhat (though far less than is commonly believed); but he had swallowed the matter of his reading, without choice and without rumination. He owed the popularity of his book to a paltry but effectual artifice, and to a poor, superficial merit. He truckled to the sinister interests and to the mischievous prejudices of power; and he flattered the overweening conceit of their national or peculiar institutions, which then was devoutly entertained by the body of the English people, though now it is happily vanishing before the advancement of reason. And to this paltry but effectual artifice he added the allurements of a

style which is fitted to tickle the ear, though it never or rarely satisfies a severe and masculine taste. For that rhetorical and prattling manner of his is not the manner which suited the matter in hand. It is not the manner of those classical Roman jurists who are always models of expression, though their meaning be never so faulty. It differs from their unaffected, yet apt and nervous style, as the tawdry and flimsy dress of a milliner's doll, from the graceful and imposing nakedness of a Grecian statue.

Abuse quite unworthy of so distinguished and high-toned a thinker as Austin was later succeeded by something like neglect. It had become a little after the middle of the nineteenth century the fashion to dwell upon the deficiencies rather than the merits of a book which for obvious reasons fails to satisfy the requirements of the present time. But during the last thirty years¹ a treatise, which, in spite of certain flaws, will for ever remain a classic, has received from scholars its meed of praise and has met with high appreciation from critics as competent as Sir Kenelm Digby, Mr. Justice Stephen, and above all, Professor Maitland.

My purpose is to examine two questions suggested by these singular fluctuations of opinion—first, what were the circumstances which for a time, at any rate, have obscured the worth of Blackstone's *Commentaries*—secondly, what are the essential merits of this legal classic, and what has been the permanent outcome of Blackstone's labours?

The circumstances which have at times obscured the reputation of Blackstone and of his *Commentaries*—in this case the man and his book cannot be separated from each other—may be summed up under three heads.

English lawyers, in the first place, though they have for well nigh a century and a half owed their earliest knowledge of the law of England to the labours of Blackstone, have, for the last sixty years² or more, rarely or never read the *Commentaries* in the form in which the book was published by its author. Englishmen have for the most part read not Blackstone's *Commentaries on the Laws of England*, but Serjeant Stephen's *New Commentaries on the Laws of England* (partly founded on 'Blackstone'). One lawyer at least must confess that he never studied Blackstone's work as a whole in its original shape until he possessed some technical claim to be the successor of the commentator.

Here we come across the curious but easily explainable

[¹ Written in 1909.]

[² Written in 1909.]

paradox, that Blackstone's immediate fame has in this, as in some other instances, been injurious to his permanent reputation. The immense success of the *Commentaries* crushed out all rivalry. The name of the commentator inspired a kind of awe. For sixty years after his death, edition rapidly followed edition; editors such as Burn, Christian, Coleridge, and Chitty, annotated the *Commentaries* with reverential care. Since 1841, it is said, Blackstone's text has never been reprinted in England. The reason is obvious. The rapidity and the vastness of the changes in the law introduced by parliamentary legislation from 1830 onwards made the re-editing of Blackstone's book by the process of simple annotation an impossibility. In 1841 Serjeant Stephen saw that the time had arrived for the production of new commentaries. He was pre-eminently qualified for the task. He was, like Blackstone, a worshipper of the Common Law. He possessed an intimate acquaintance with its mysteries. He had already gained a high reputation by a treatise of rare originality on Pleading. He had by a stroke of genius converted an art whereof the obscure maxims were a secret known only to special pleaders into a science based on logical grounds intelligible to every educated reader. Of this science he had exhibited the principles in logical order and expressed them in a series of rules of unequalled clearness and terseness. His clear and accurate style gave exact expression to the conclusions reached by the subtlety of his intellect. Had he boldly struck out a path for himself he would have left us an account of English law, in the middle of the nineteenth century, more complete and more logical than the picture of the law of England towards the close of the eighteenth century which has been handed down to us by Blackstone. His modesty and his intense veneration for the commentator's work forbade him to enter into competition with his predecessor. He resolved not to write a new book, but to preserve, and where necessary, to amend the language of the *Commentaries*. He re-arranged the celebrated treatise from top to bottom. By an effort of infinite labour and acuteness he preserved wherever it was possible Blackstone's original language, and marked off distinctly any change introduced into it. He at the same time so modified Blackstone's words as to make them precisely correspond with the then existing law. It might have been hoped that the union of Stephen's accuracy and acumen with Blackstone's literary grace and power, would produce a book which should combine the different merits of the two writers. This expectation was not fulfilled. The reputation of each has suffered from their literary partnership. Serjeant

Stephen was above all things a logician. In editing the work of Blackstone he did not find full scope for exhibiting the discriminating refinement of his intellect. Blackstone was somewhat deficient in keen logical discernment. He was above all things a man of letters. His editor's efforts to correct logical defects spoilt the literary charm of the *Commentaries* without satisfying the demands of logical accuracy. Stephen's labours enabled students to study English law in a work founded on Blackstone, but they led to the result that the most readable of English law books is rarely read exactly as it was written by its author. To any critic of Blackstone, as to any student of English law, I unhesitatingly give this advice: Begin your study by reading Blackstone's *Commentaries*. Keep in mind that the book describes English law as it stood towards the end of the eighteenth century, and then read the *Commentaries* without the use of note or comment.

In the second place Blackstone's professorial fame had, even whilst his commentaries were known only as lectures, brought upon him a strange calamity which, in the long run, immensely and injuriously affected the reputation of his work. The fatal mishap was this: The renown of the lectures attracted to the professor's class a young man—I should rather say a boy—of genius. Jeremy Bentham at the age of fourteen or fifteen, came to hear Blackstone, and for this privilege, by the way, paid six guineas. Children—and Jeremy was little more than a child—are logical. Children are critical. Children are cruel. The most promising of your pupils, let every lecturer remember, will become the most remorseless of your censors. Bentham came to the lectures, he heard, and he condemned. He detected a fallacy of his master's in regard to natural rights. He left the classroom with the conviction that Blackstone's notions were frivolous, illogical, and futile. Blackstone's misfortune did not end here. Bentham, as a young man of twenty-five, gave full effect to the judgment passed by the boy of fifteen. He wrote his *Fragment on Government*. It is the most trenchant critique ever penned by a youthful pupil on the doctrines of a celebrated teacher whose dogmas were accepted by the learned world as profound truths. The *Fragment*, which was merely a small part of an intended *Comment on the Commentaries*, is open to criticism, but it was an attack which achieved complete success. It proved once and for all that Blackstone had met with a controversialist of immense dialectical power, and that the commentator, though a distinguished lawyer and a great man of letters, was a lax thinker. The

Fragment, published anonymously, startled the learned world. Dr. Johnson, it is said, attributed it to Dunning. Lord Mansfield, with all his appreciation of Blackstone's literary skill, is reported to have enjoyed the assault on Blackstone's reasoning. Among men of thought Blackstone's reputation as a profound jurist never recovered the blow struck at him by the *Fragment on Government*.

The misfortune to Blackstone of coming across the path of Jeremy Bentham did not end with a mere argumentative defeat. It was closely connected with that hostility of the whole utilitarian school which is the third and most serious cause of the depreciation of the *Commentaries*. The attack embodied in the *Fragment on Government* was in truth the first skirmish in a campaign carried on for more than half a century by Bentham and his disciples against the influence and the renown of the commentator. To the whole utilitarian school Blackstone became 'the enemy.' This war-cry, as we shall see, was raised by Bentham himself. What, we may well ask, was the source of this animosity. Blackstone, like Bentham, was a child of the eighteenth century. He was a philanthropist. It is noted in the review to be found in the *Annual Register* that 'his unbounded philanthropy, and the eloquence and tenderness with which he pleads the cause of humanity, must always procure him the most favourable reception.' He was a man of high public spirit; on a critical occasion he refused to barter his political independence for patronage from the Duke of Newcastle. He was neither a Tory nor a bigot. He believed in civil and religious freedom as understood in England and as interpreted by Locke. He was in truth a typical Old Whig. Dying as he did in 1780 he knew nothing of the enthusiasm excited by the opening of the French Revolution. In no case could such a man, even had he lived ten years longer, have shared the feeling that

Bliss was it in that dawn to be alive
And to be young was very Heaven.

But then Bentham himself had no sympathy with revolutionary enthusiasm, and detested the doctrine of innate rights, and exposed with remorseless logic the fallacies contained in the Declaration of the Rights of Man. And Blackstone did not live long enough to share the panic-struck vehemence of the Tory reaction excited by indignation at the Reign of Terror. To him, at least, can never be imputed the wish:

To undermine
Justice, and make an end of Liberty.

Why, we ask, should the utilitarians have regarded Blackstone as their foe? The answer is that the conflict between the Benthamites and the commentator was from the nature of things inevitable. Bentham was a born reformer. To himself and to his disciples law itself was of value only as one of the means for forcing on the progress of mankind along the paths marked out by utilitarian philosophy. To advocates of a reformation which they deemed would infinitely increase the welfare of the world, nothing is so hateful as the placid Conservatism which preaches contentment with things as they are. Now Blackstone, just because he was a Revolution Whig, saw in England, as did many of the wisest men of his generation, such as Montesquieu, Voltaire, Chatham, and Burke, the one great free State where arbitrary government was unknown, and individual freedom of speech and of action was protected by the rule of fixed law. Hence his intense admiration for English law and for English institutions. He perpetually plays the part of an apologist. Nor can the warmest admiration for Blackstone conceal from us that his apologetics sometimes verge on absurdity. The desire to fix a reasonable ground for the pettiest customs, or to palliate habits which do not admit of defence, lead him occasionally to forget the common-sense characteristic of his time. He tells us, for example, that

on the taking of a whale on the coasts, which is a royal fish, it shall be divided between the king and queen; the head only being the king's property, and the tail of it the queen's. . . . The reason of this whimsical division, assigned by our ancient records, was, to furnish the queen's wardrobe with whalebone.

Subsequent editors of the *Commentaries* have pointed out that the reason was indeed outrageously 'whimsical,' for the whalebone lies entirely in the head of the royal fish.

The husband [he writes] might give his wife moderate correction. . . . But, with us, in the politer reign of Charles the Second, this power of correction began to be doubted: and a wife may now have security of the peace against her husband. . . . Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege.

Surely the boldness is far more obvious than the wisdom of an apology which suggests that a costermonger who smashes his wife's nose is inspired with enthusiasm for the common law. Observe lastly Blackstone's veneration, bordering on idolatry, for the English Constitution.

Of a constitution, so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely its due: the thorough and attentive contemplation of it will furnish its best panegyric. It hath been the endeavour of these *Commentaries*, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of those several parts, to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of antient simplicity, and the more curious refinements of modern art. Nor have its faults been concealed from view; for faults it has, lest we should be tempted to think it of more than human structure; defects, chiefly arising from the decays of time, or the rage of unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom as are delegated by their country to Parliament. The protection of *The Liberty of Britain* is a duty which they owe to themselves, who enjoy it; to their ancestors who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind.

At the beginning of the twentieth century an intelligent critic can easily see that Blackstone's exaggerated optimism arises in great part from love for English freedom and detestation of foreign despotism. To the utilitarian reformers his somewhat grotesque apologetics seemed to betray a deliberate disposition to arrest improvements on which depended the welfare of mankind. This was certainly the light in which the matter presented itself to Bentham.

If to this endeavour [to improve the law] we should fancy any author, especially any author of great name, to *be*, and as far as could in such case be expected, to *avow himself* a determined and persevering enemy, what should we say of him? We should say that the interests of reformation, and through them the welfare of mankind, were inseparably connected with the downfall of his works: of a great part, at least, of the esteem and influence, which these works might under whatever title have acquired.

Such an enemy it has been my misfortune (and not mine only) to see, or fancy at least I saw, in the author of the celebrated *Commentaries on the Laws of England*; an

author whose works have had, beyond comparison, a more extensive circulation, have obtained a greater share of esteem, of applause, and consequently of influence (and that by a title on many grounds so indisputable), than any other writer who on that subject has ever yet appeared.

As time went on Bentham's bitterness towards his 'enemy' increased. Of Blackstone he writes: 'His is the *foedum crimen servitutis*—the foulest of all intellectual blots that can deform a character.' The apologist has in Bentham's eyes become the traitor. With Austin, as we have seen, it was impossible to acknowledge merit even of a literary kind, in an author whose influence was to him so detestable as the commentator's.

If Blackstone's apologetic optimism excited the hatred of Benthamite reformers, some of his minor defects, and even some characteristics which a modern critic might deem to be merits, were intensely distasteful to utilitarians. After the manner of his time he used language which sanctioned that belief in natural rights which was as repulsive to Bentham as to Burke. To a limited extent he anticipated the historical method. But then Bentham, rightly enough from his own point of view, certainly regarded the study of legal antiquities as a sheer waste of time, and possibly with instinctive prescience perceived, that the historical spirit must be unfavourable to the amendment of the law of the land in accordance with the principles of utilitarianism. However this may be, the Benthamite campaign carried on through at least two generations against the influence of Blackstone was not only natural but inevitable. It led not, indeed, to the downfall but to the depreciation of his work.

Wherein then are to be found the permanent merits of the *Commentaries*?

They may all be summed up in a few words. The book is the work of an eminent lawyer who was also a consummate man of letters; by virtue both of his knowledge of law and of his literary genius he produced the one treatise on the laws of England which must for all time remain a part of English literature. The *Commentaries* live by their style.

This assertion itself needs explanation. It will be misunderstood unless the word 'style' be taken in a wide and unusual sense. To most readers it means no more than the command by an author of a copious and appropriate vocabulary. Even this mere mastery of language means more than many of us perceive; we must always bear in mind the *dictum* of Coleridge that 'an inconceivably large portion of human knowledge and human power is involved in the science and management of words.'

We shall then find that the command of style implies the possession by an author of at least three rare qualities: power of expression, clearness of aim, literary judgment or tact. In each of these characteristics Blackstone stands pre-eminent.

His mastery of expression was visible enough to Bentham; who aptly describes the commentator as one 'who, first of all institutional writers, has taught Jurisprudence to speak the language of the scholar and the gentleman.' His style, even in the narrowest sense of that word, is, in the language of Bentham, 'correct, elegant, unembarrassed, [and] ornamented.' It was universally admired by a generation trained in the school of Johnson. Tried by the standard of modern taste, it exhibits something of pomposity, but it is always lucid. Blackstone says what he means to say with clearness, and his tone rises and falls with the requirements of the subject-matter. His language is simple when he explains legal technicalities, it reaches dignity when he insists upon the glory of the English Constitution.

Blackstone's work, in the next place, is marked by perfect clearness of aim. He meant to treat of English law as a whole, and he succeeded in his endeavour.

Bracton [it has been well said] was rivalled by no English juridical writer till Blackstone arose five centuries afterwards. Twice in the history of England has an Englishman had the motive, the courage, the power to write a great readable, reasonable book about English law as a whole.

These are the words of Professor Maitland. No Englishman in our own time has arisen capable of repeating the feat performed both by Bracton and by Blackstone unless it be Maitland himself. From him, but for the unkindness of fate, we might well have received a survey of the whole law of England even more complete than that contained in the celebrated *Commentaries*, and marked by an historical knowledge and a depth of philosophic insight unknown to Blackstone, and, in fact, unattainable in the eighteenth century.

Blackstone [writes Sir J. F. Stephen] first rescued the law of England from chaos. He did, and did exceedingly well, for the end of the eighteenth century, what Coke tried to do, and did exceedingly ill, about 150 years before; that is to say, he gave an account of the law as a whole, capable of being studied, not only without disgust, but with interest and profit. If we except the *Commentaries* of Chancellor Kent, which were suggested by Blackstone, I should doubt whether any work intended to describe the whole of the law of any country possessed anything like the same merits.

Neither Blackstone's command of language nor his definiteness of aim would have ensured the successful performance of a most arduous task had he not been endowed in the highest degree with literary judgment or tact. Of his supreme skill in the use of literary judgment no better example can be given than his unrivalled success in blending the history with the exposition of English law. How to achieve this combination is the problem which drives to despair any teacher who undertakes to explain adequately and intelligibly the existing law of England. For that law itself is the outcome of historical causes, often in themselves very obscure, and recorded, if at all, in judicial decisions and a series of statutes extending over many centuries. The perplexed expounder therefore of such a system soon finds that if he neglects historical considerations, he falls into the vice of logical formalism, whilst, if he pursues the history of any law too far, he becomes involved in the mazes of pedantic antiquarianism. No formula will tell any man what is the method by which to avoid both of these opposite errors. It can be discovered only by the use of good sense and tact. It is here that Blackstone's sound judgment came to his aid. He knew when to curtail and when to abound. His acquaintance with legal history was often at fault, though it was, as good authorities have held, on a level with the knowledge of his time. But he intuitively perceived the amount of historical information necessary to explain the rules of English law. He never gave his readers either more or less of historical information than was sufficient to render the existing law of England intelligible. He knew that he was a teacher of law, and neither a legislative reformer, nor a logical dogmatist, nor a legal antiquarian. He remembered that the primary object of a teacher is to excite the intelligent interest of his readers or his hearers. Hence he selected for special exposition topics which are at once interesting and important, and thus has enlisted the attention of one generation after another of charmed readers. As illustrations of his skill, let me refer to his account of the rise, the progress, and the gradual improvement of the laws of England; to his sketch of the feudal system; to his tale of the doctrine of the benefit of clergy; to his explanation of the action of ejectment, where the solemn description of a portentous series of legal fictions excites, and was intended to excite, not only interest, but amusement; to his explanation of the growth and nature of equity, which, at any rate till quite recently, remained the best, as it was certainly the most readable, exposition of a matter as to which the ideas even of trained lawyers exhibit no small

perplexity. The assertion that Blackstone's learning was inadequate, and that, in common with other writers of the age in which he lived, he has fallen into errors which have since his day been exposed, may contain an element of truth, but is for the matter in hand irrelevant. No one contends that he was a profound historian, still less that he was an original thinker, who placed jurisprudence on a new basis, as Adam Smith laid the foundations of modern political economy. What a just critic may confidently assert is that Blackstone displayed as an expounder of English law incomparable tact in his treatment of a most difficult topic, and especially the soundest judgment in the application of history as he knew it to the elucidation of law. 'So far as I am qualified to judge,' writes Sir J. F. Stephen, 'I should say that though Blackstone did not encumber himself with useless learning, he knew nearly everything relating to the subject on which he wrote which was at all worth knowing.' He possessed, that is to say, precisely the kind and extent of knowledge needed by a professor of law.

Literary power then of the rarest quality enabled Blackstone to grasp with masterly ability the happy opportunity for achieving the task which he had set before himself of reviving professorial instruction and of exhibiting the whole law of England in an adequate literary form. He assuredly wrote under a happy star. The success of his work was favoured by several circumstances which no longer exist. The intellectual apathy or somnolence of Oxford during the eighteenth century has been the subject of exaggeration. Still the amount of good teaching provided by the University in 1753, when he began to deliver public lectures, was admittedly small. The sudden appearance of a capable teacher who gave attractive lectures was a startling phenomenon. Blackstone had the advantage of drawing to his classes all the youthful intelligence of Oxford. The pupils who gathered round him probably included every man who had any taste or desire whatever for study. The law of England, further, was in 1765, when the first volume of the *Commentaries* was published, complete and symmetrical. The foundations of the Common Law and of Equity were firmly established. Our legal system, looked at from a practical point of view, was far indeed from being the voice of absolute reason, but it was coherent. Fifty years at least were to elapse between the publication of the *Commentaries* and the beginning of that constant improvement or alteration of the law by parliamentary legislation which began about 1830, and has continued to the present day. Blackstone, therefore, could contemplate the law

which he described as a possibly strange, but assuredly coherent and immutable body of doctrine. Utilitarian reform, carried out through the instrumentality of Parliament, may have promoted human happiness; it has without doubt delayed the growth of legal literature. The law has year by year increased in bulk and has lost its symmetry. No man of letters however skilful—not even the great commentator himself—could, from a literary point of view, make anything of a modern statute. An Act of Parliament produced by the skill or cunning of parliamentary draftsmanship, and modified to meet the exigencies of party warfare, is, to put the truth plainly, a document written in the very worst English known to the civilized world. Even in his own time, Blackstone had perceived the wisdom of avoiding Acts of Parliament; he glides with deftness over the Statute of Frauds. Blackstone, in the last place, lived at a time when the learned world was still a reality, when there was an established standard of style and when men of letters could address themselves, even when writing on such a subject as law, neither to experts, nor to practitioners, nor to that unsatisfactory class now known as general readers. The audience of whom Johnson, Goldsmith, Hume, Adam Smith, Gibbon, Burke, and Blackstone courted and received the approbation, was made up of the educated gentlemen of England. It is no accident that these authors and others belonging to the same period, greatly as they differed from one another, were all of them masters of style. It was, in short, the commentator's happy fortune to have lived at a date when the learned world supplied him with the right method of expression, and when—the two things are only different sides of one phenomenon—he could address the definite class of educated English gentlemen in the language accepted by all men of liberal education. Of this advantage he availed himself to the utmost. This is no mere conjecture. The advertisement of his first course of lectures exactly describes his attitude.

Oxford, 23 June, 1753

In *Michaelmas* Term next will begin

a

Course of Lectures

on the

Laws of England

By Dr. Blackstone of *All-Souls* College.

This Course is calculated not only for the Use of such Gentlemen of the University, as are more immediately

designed for the Profession of the Common Law; but of such others also, as are desirous to be in some Degree acquainted with the Constitution and Polity of their own Country.

To this end it is proposed to lay down a general and comprehensive Plan of the Laws of *England*; to deduce their History; to enforce and illustrate their leading Rules and fundamental Principles; and to compare them with the Laws of Nature and of other Nations; without entering into practical Niceties, or the minute Distinctions of particular Cases.

The Course will be completed in one Year; and, for greater Convenience, will be divided into four Parts; of which the first will begin to be read on *Tuesday* the 6th of *November*, and be continued Three times a Week throughout the Remainder of the Term: And the following Parts will be read in Order, one in each of the three succeeding Terms.

Such Gentlemen as propose to attend this Course (the Expence of which will be six Guineas) are desired to give in their Names to the Reader some Time in the Month of *October*.

The genius of the commentator, the charm of his book, the originality of his idea, the circumstances of his own time, when the progressive development of English institutions had not yet been arrested by the violence and the horrors of the French Revolution, ensured his personal and well-deserved success. What, however, has been the permanent outcome of Blackstone's labours?

They ended, indeed, from one point of view, in failure. He did not in England found a school; he did not leave behind him successors competent to carry on his work; he has been followed by five Vinerian Professors who, to use a delightful expression of Mr. Sidney Lee's, 'death qualified' long ago for admission to the *Dictionary of National Biography*. Some of them have not been admitted to that roll of English worthies. His immediate successor—Robert Chambers—held, it would appear, the Vinerian Professorship at Oxford whilst performing judicial duties in India. He is remembered as one of the judges who took part in the trial of Nuncomar. The next, Richard Wooddeson, published, as the result of his Vinerian lectures, a law book of some little reputation in its day, but now entirely forgotten. A third was Blackstone's own son, and Principal of New Inn Hall. Of the rest there is nothing to be said. It is strange that neither Blackstone's unique professorial reputation,

nor the fame of his *Commentaries* nor the well-merited reward of his elevation to the Bench, should have aroused among most of the deceased successors to his Chair the ambition to carry on his work. He, and they also, suffered in truth from the unkindness of the times. The French Revolution, the great war, the aversion prevalent between 1815 and 1830 to every kind of innovation, the vehement political contests which accompanied the era of reform, each and all in their way checked the intelligent study of the law of England. Tory lawyers who admired the *Commentaries* were the last men to encourage professorial teaching of law at the Universities or elsewhere. Benthamite reformers imagined the English Universities, and especially Oxford, to be the chosen homes of prejudice, not to say ignorance; utilitarian Liberals were hostile to the teaching of a legal system which in their eyes required not explanation, but drastic amendment. Yet Blackstone's life-work, and above all his faith in the necessary alliance between law and letters, have in fact been fruitful of memorable results. Failure to create a great school of law in England has been balanced by a triumphant success in the United States, of which Englishmen hardly appreciate the importance. Americans, even before the Thirteen Colonies established their independence were, and have till to-day continued to be a nation of lawyers; the Constitution of the United States owed its creation, and still owes its maintenance to the fact that the people of America have been thoroughly imbued with the principles, we might even say with the prejudices, of the English common law. Hence the soundness and the extension of legal education is in America a matter which deeply and obviously concerns the welfare³ of the nation. Now—and this is the matter here to be noted—legal education has in the United States been from the beginning influenced by the work and the ideas of Blackstone.

We transplanted [has written one of the most eminent among American law professors] an English root, and nurtured and developed it, while at home it was suffered to languish and die down. It was the great experiment in the University teaching of our law at Oxford, in the third quarter of the eighteenth century, and the publication, a little before the American Revolution, of the results of that

³ Lincoln and many of his friends and contemporaries received much intellectual training from the study of legal writers such as Blackstone, and from the constant discussion of the pre-eminently legal and constitutional questions raised by the inevitable conflict between North and South. The effect and the solidity of this education in law and politics has been underrated in Europe.

experiment, which furnished the stimulus and the exemplar for our own early attempts at systematic legal education.⁴

Blackstone's book inspired with enthusiasm the most eminent among American lawyers.

I retired to a country village [Chancellor Kent tells us, in speaking of the breaking up of Yale College by the war, where he was a student in 1779] and, finding Blackstone's *Commentaries*, I read the four volumes. . . . The work inspired me at the age of fifteen with awe, and I fondly determined to be a lawyer.

And Kent became himself the author of *Commentaries* which alone rival those of Blackstone. To the example of the Vinerian Professorship is distinctly due the foundation in Massachusetts of the professorial Chair where Story expounded every portion of the law of England and continued his professorial labours even when raised to the bench of the Supreme Court of the United States. Kent, Story, and Marshall, are merely a few among the many distinguished American lawyers who in spirit were the disciples of Blackstone. The famous American law schools, such as those of Harvard, Yale, Columbia, California, and Michigan, are in a real sense the fruit of his work and of his ideas. It is idle to apply in any serious sense the term failure to the career of a teacher the force of whose genius is felt and acknowledged in the universities where the most eminent professors of English law teach the principles of the law of England to the citizens of that Republican Commonwealth, which is as much the work of the English people as is the constitutional monarchy of England.

There is no need, however, to base Blackstone's lasting success on the result in the United States of his life-work. His spirit has achieved great things for England and for Oxford.

Blackstone has afforded a splendid proof of the untold effect which in the sphere of legal education may be produced by the combined talent and energy of an individual teacher. The Oxford of 1753 was, if not actually asleep, assuredly not fully awake. The idea that any man could learn English law at the University was to the English world a novelty, and, we may be sure, to the mass of English lawyers an absurd heresy. The voice of Blackstone roused the University from its slumbers. He

⁴ *The Teaching of English Law at Universities*, by James Bradley Thayer LL.D., Weld Professor of Law at Harvard (1895), pp. 4, 5. From this pamphlet, which ought to be far better known in England than it is, my statements as to the influence of Blackstone in America are mainly taken; it is, however, past a doubt.

convinced his hearers, at any rate, that law was a science in which every educated gentleman might feel an interest.

To the present generation he supplies a warning never more needed than at this moment against trust in intellectual mechanism. We hear much about the necessity for the co-ordination of studies, for the combination of effort, for the offering of new attractions to new classes of students. All this is in itself good. Still these exhortations tempt us to forget that the effectiveness of education is at least as desirable as its extensiveness. The memory of Blackstone reminds us that in education the teacher is everything, the system is comparatively nothing. The one Englishman who has gained lasting fame as a great professor accomplished his real life-work between the ages of thirty and forty-six, unaided or unimpeded by the examination system and all that it involves. He worked alone and gave to English literature what in his day was its one legal classic. Such a performance was of necessity the achievement of one man. In the world of letters you cannot substitute co-operation for individuality. The united labours of a thousand lawyers may create, and I trust will create, an Encyclopaedia of English Law,⁵ but they will never, even though they have a Lord Chancellor at their head, give birth to a work which will rival the *Commentaries on the Laws of England*.

The commentator, lastly, anticipated and marked out the path of reform which now for well-nigh fifty years has been pursued in England by the ablest professorial expositors of our law. Inspired by the spirit of Blackstone, they have tried 'to teach jurisprudence to speak the language of the scholar and the gentleman,' and have re-asserted and re-established the union between law and letters. They have begun a reformation in the study of the law of England which has already been crowned by an immense, if as yet unrecognized, success.

Consider the state of things as late even as 1850. At that date England possessed no body of legal literature. The history of English law was, in truth, unwritten. The year-books were unexplored. Reeves's *History of English Law* was unreadable and unread. Historians were blind to the intimate connexion between the ideas of English law and the progress of the English people. Macaulay was a lawyer. He was a codifier of rare originality; his illustrative genius has fixed the form of all our Indian codes. He delighted to connect the political annals of England with the intellectual and social life of the people. Yet

[⁵ Written in 1909.]

his celebrated description of the state of England in 1685, when the Crown passed from Charles II to his brother, contains little, if anything, as to the development of our law during a most critical period. It contains not even an allusion to the Statute of Frauds, though the Act in more ways than one illustrates the condition of England. The omission to take any account of the growth of English law is the stranger, because Macaulay describes Lord Nottingham 'as the man who first educed out of the chaos, anciently called by the name of equity, a new system as regular and complete as that which is administered by the judges of the Common Law'; and knew therefore of the immense change produced by the transformation of equity from a sort of arbitrary fairness into a legal system of ameliorated law. The untold effect, however, of legal ideas on the course of national and especially of English history, was in 1849 hardly understood, and awaited its revealer. Jurisprudence again, or in other words the general principles of law, hardly arrested the attention of lawyers or of moralists. Blackstone's doctrines concerning the nature of law and of sovereignty, as also the criticisms of the utilitarian school, had ceased to arouse interest.

Of foreign writers such as Savigny, English lawyers, as a rule, knew nothing.⁶ Blackstone was not profoundly acquainted with Roman Law, but he knew more about it than most English lawyers who flourished towards the middle of the last century. Turn now to the field of constitutional theory. No progress had there been made since the time of Blackstone, at any rate by English lawyers; they had forgotten the invaluable hints as to the real nature of constitutional law thrown out by Paley in his *Moral Philosophy*. Englishmen still accepted theories which whatever their original merit when propounded by Montesquieu and accepted by Blackstone, had by the middle of the nineteenth century become all but inapplicable to the actual government of England and sorely needed criticism and revision. Of law books for the guidance of practitioners there existed of course in 1850, as there will always exist, a large number of treatises marked by varying worth or worthlessness. Of text-books which should lay down for the guidance of intelligent readers the elementary principles governing each department of law there were few, or none of any eminent merit. Such works when rising to any high degree of excellence have in most countries

⁶ With a knowledge not possessed by his contemporaries, Mr. Westlake in 1858 applied doctrines gathered from Savigny, and other German authorities, to the elucidation of the conflict of laws, and thereby gave in several respects a new turn to the judicial development in England of that branch of the law.

been the fruit of professorial lectures. The lack of good textbooks probably resulted from the failure of our universities to take part in the teaching of law. However this may be, most of the works which fifty or sixty years ago⁷ were recommended to the attention of young gentlemen reading for the Bar, displayed little of logical power and really nothing of literary lucidity. A well-known treatise on the Law of Contract, usually placed in the hands of students at least as late as 1860, did not attempt to analyse the nature of a contract and left on the mind of an ingenuous reader the impression that somehow or other at the very centre of the whole law of contract lay the fourth and the seventeenth sections of the Statute of Frauds. Law libraries, of course, were crammed with weighty volumes filled with masses of undigested information, but it would be unbecoming irony to attribute literary charm or lucidity to Sugden on Powers, or to Smith's, or White and Tudor's Leading Cases. The England then of 1850 did not possess a body of legal literature.

Note now the change effected within less than fifty years. It dates from 1861. In that year the publication of Maine's *Ancient Law* and the republication of Austin's forgotten *The Limits of Jurisprudence Determined* attracted general attention. Each book was the outcome of professorial lectures; each revived in England an interest in the growth of legal ideas and in jurisprudential problems. The lines of thought suggested by these two writers have now been followed out by disciples, mostly law professors, or what I may be allowed to call professorial lawyers, of marked distinction. Thus Holmes (now a judge of the American Supreme Court),⁸ who began his career as a professor at Harvard, has examined in his *Common Law* a mass of intricate questions, logical, jurisprudential, and historical, raised by the obscure history of English legal conceptions. Professor Thayer has in a work, of which a too early death prevented the completion, thrown an infinity of light on the nature and the development of that law of evidence which constitutes a most characteristic department of the law of England. Maine has, as a teacher of jurisprudence, carried out more directly than any other author one side of the work of Blackstone, by showing conclusively that legal ideas and rules might in the nineteenth, no less than in the eighteenth century, be treated with literary grace and charm. Meanwhile, Professor Holland in his *Jurisprudence* has stripped Austin's dogmas of their pedantry, has freed them from needless and burdensome

[⁷ Written in 1909.]

[⁸ Recently retired.]

connexion with the utilitarian polemics and has at the same time enriched jurisprudence with valuable and original ideas of his own. At this moment Professor Vinogradoff,⁹ who has made the law of every nation his province, is year by year helping us to see with increased clearness the inseparable connexion between the ideas embodied in English law and the progress of the English people. For the movement, which I can describe only in the barest outline, has turned the full light of research on the records and history of our law. Inquirers of every kind begin to read the Year-Books. The Selden Society publishes each year new documents illustrating the annals of English law. Pollock and Maitland have given us their monumental *History of English Law* down to the time of Edward I. The literary merit of the book must be patent to every man who will read with care as much as the first two hundred pages; yet a work which attracts every student affords more of information and of judicious theory than the most learned teacher could easily master without strenuous thought. Dr. Holdsworth has this very year completed a *History of English Law*¹⁰ which, while it gives in a form suited for the use of learners the result obtained by Pollock and Maitland, extends to periods not covered by their work and contains original thought for which Dr. Holdsworth may claim the credit and accept the responsibility of parentage. Criminal law found in Sir J. F. Stephen, who before he was raised to the Bench lectured professorially at Lincoln's Inn, its historian, and but for the indifference or indolence of Parliament, would have found its codifier.

In 1867 Bagehot's *English Constitution* gave new life to the study of constitutional law. His *English Constitution* swept away the literary theory which concealed the actual working of English institutions, and forced upon the attention of every educated person in England or the United States who cared to understand the nature of parliamentary government, the immense importance and the nature of the English Cabinet. Bagehot, it is true, was not a professor. He was, however, influenced by the teaching of Maine. He participated in the movement for the renovation of legal literature. To that movement his own vivifying originality added untold force. It indirectly brought into view the distinction between constitutional law and constitutional conventions which lies at the basis of Anson's exhaustive treatise on the *Law and Custom of the Constitution*. It made it possible for the author of the *Law of*

[⁹ At that date—1909—Corpus Professor of Jurisprudence, Oxford. He died in 1925.] [¹⁰ The first edition of Vols. II and III was published in 1909.]

the Constitution to form a diffident hope that the labours of more than twenty-five years have revealed to the public the doctrine, or rather the fact of the sovereignty of Parliament. To the suggestiveness of Bagehot, and even more to the enthusiasm now felt in every land where the law of England prevails for the creation of legal literature, may be ascribed the production of two professorial works which are already acknowledged to be classics, Bryce's *American Commonwealth* and Lowell's *Government of England*. Nowhere are the fruits of the movement, of which the prophet, so to speak, was Blackstone, more clearly seen than in the improvement of our legal text-books. In this reform generous help has been received from colonial teachers such as Hearn and Salmond. But it is impossible for me within the limits of a single article, to give more than one or two examples of a phenomenon traceable in every department of English law. The exposition of the Law of Contract was in 1867 rationalized by Leake's *Elements of the Law of Contract*. It is an invaluable legacy from the last of the special pleaders; it combines the sagacious accuracy of the old pleaders with the desire of the new school of writers to free the exposition of law from needless technicalities. Since his time work after work has carried further and applied to the law of England the analysis of contractual agreement. Professor Pollock's¹¹ *Principles of Contract* solves problems, which have perplexed both students and learned lawyers, by the application thereto of ideas gathered both from foreign writers and from an elaborate study of English authorities. Anson's *Law of Contract* has supplied to the law students not only of the United Kingdom but also of the United States, one of the very best of legal manuals. Professor Kenny's *Criminal Law* elucidates his subject in a manner which proves conclusively, if proof were needed, that the art of treating legal topics with the literary skill which makes a legal text-book a work full, not only of instruction, but of interest, may be displayed to-day quite as markedly as in the time of Blackstone. Let it be noted that Anson's *Law of Contract*, Professor Bigelow's, or Professor Pollock's *Law of Torts*, or Strahan's *Law of Property*, as well as scores of excellent manuals which I have not space here even to enumerate, form a class of books which, as I have insisted, did not exist in the England of 1850.

This revival of legal literature has produced two effects. Now that law has learnt to speak the language of gentlemen and

[¹¹ Corpus Professor of Jurisprudence, Oxford, 1883—1903.]

scholars, laymen distinguished as moralists and thinkers have begun to interest themselves in legal speculation. Sir Leslie Stephen's *Science of Ethics* traces out with singular sagacity the relation between law and morality. Professor Sidgwick's *Elements of Politics* contains subtle criticism on the Austinian doctrine of sovereignty. The popularization, again, of legal ideas has stimulated the effort to reduce the rules of English law to such a body of principles as is to be found in Stephen's *Digest of the Criminal Law*, or Chalmers's *Digest of the Law of Bills of Exchange*; and these unauthorized digests, some of which have already passed into Acts of Parliament, are laying the foundation of a complete code of the law of England. Now this renewed life of legal literature in England is almost wholly the work of professorial men. But they will be the first to acknowledge that their work is far from complete, and that the ideas which underlie their efforts were first taught by Blackstone. He will remain for ever the eminent lawyer, the perfect professor, the consummate man of letters whose genius claimed and vindicated for English law its high and rightful place in the noble literature of England.

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INTERNATIONAL LAW AND RESORT TO
ARMED FORCE.

J. L. BRIERLY.

I.

THE relation of war to the international system was stated by W. E. Hall in a well-known passage of his treatise in these words: 'International law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation.'¹ This view, which came to be more or less generally accepted by international lawyers in the course of the nineteenth century, marked the definite abandonment of the claim of the classical jurists to distinguish between *bellum iustum* and *bellum iniustum*, and it was in a sense an admission that international law had so far failed in the primary task of all legal systems, that of establishing and maintaining a distinction between the legal and the illegal use of force. But it had the great merit of candour, and it brought the theory of the law into accord with what had always been and still remained the facts of international practice.

War, however, is only the most extreme form that an appeal to force may take; and certain measures of coercion by violent means, but not amounting to war and regarded as consistent with the continuance of a state of peace between the parties, have also to be fitted into the international system. As regards these the attitude of the law has been hesitating. Westlake, indeed, says frankly that 'so far as any form of force in peace is recognized as an international institution, it is a weapon placed in the hands of States to be used, so far as law is concerned, in their discretion.'² Certainly when once we have admitted that the law must stand aside when States resort to war, there is a certain unreality in its undertaking to pronounce on the legality or otherwise of their conduct when they resort to a milder form of force, for an allegation of illegal action can easily be displaced

¹ International Law (8th ed.) p. 82.

² International Law, Part II, p. 19.

by merely acknowledging the existence of a war. Thus in 1902 Germany, who, together with Great Britain, had instituted a blockade of Venezuelan ports, at first described her action as a *pacific* blockade, but on the United States protesting that a *pacific* blockade could not, as Germany proposed, be enforced against neutral ships, she accepted what appears to have already been the British view, and recognized that a state of war had come into existence³ despite the fact that in most other respects the measures taken were nearer to a *pacific* blockade than to war as ordinarily waged.

On the other hand other writers have attempted to establish certain rather general conditions for the legal application of measures of force which do not amount to war. Hall says of reprisals that 'they are supposed to be used when an injury has been done, in the commission of which a State cannot be expected to acquiesce, for which it cannot get redress by purely amicable means, and which is scarcely of sufficient magnitude to be a motive of immediate war.'⁴ 'To make reprisals either disproportioned to the provocation, or in excess of what is needed to obtain redress, is to commit a wrong.' Oppenheim's view is similar. 'Reprisals,' he says,⁵ 'are admissible in the case of international delinquencies solely and exclusively.' They 'must be in proportion to the wrong done, and to the amount of compulsion necessary to get reparation.' They 'are admissible only after negotiations have been conducted in vain for the purpose of obtaining reparation from the delinquent State.'⁶ Fauchille⁷ insists in the same way on the rule of proportion to the offence and on the necessity for a previous demand for reparation having been made in vain. But it is noticeable that all these writers seem conscious of a certain unreality in the profession of the law to regulate reprisals. *Elles sont fréquemment, says Fauchille, un pur fait brutal, et non l'exercice régulier d'un droit.*

Apart from these rather uncertain limitations imposed by customary international law, the right to resort to armed force had been limited before the War in one case by convention. The second Hague Convention of 1907 provided in Art. I that: 'The contracting Powers agree not to have recourse to armed

³ Cf. Moore, Digest, VII, 140.

⁴ *Ibid.* p. 434.

⁵ International Law (4th ed.), Vol. II, p. 84.

⁶ These three conditions were applied judicially in an arbitration between Portugal and Germany arising out of damage caused in the Portuguese colonies by Germany during the war and justified by her as acts of reprisal. The award is reported in *Revue de droit international*, 1929, p. 255.

⁷ *Traité de droit international public*, Tom. 1, 3me partie, p. 690.

force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.'

II.

In the attempts that have been made since 1919 to organize the peaceful relations of the society of States, provisions limiting the right to resort to war hold a prominent place, and it is no longer true to say that international law accepts war 'as a relation which the parties to it may set up if they choose.' The most important limitations are those imposed by the Covenant of the League of Nations and by the Pact of Paris, which may be summarized as follows:

In the Covenant the member States have undertaken

- (a) by Art. XII to submit 'any dispute likely to lead to a rupture' either to arbitration or judicial settlement or to inquiry by the Council, and 'in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council.'
- (b) by Art. XIII not to 'resort to war' against any member of the League that complies with an award or a decision.
- (c) by Art. XV not to 'go to war' with any party to a dispute that complies with the recommendations of a report by the Council unanimously agreed to by the members thereof other than the parties to the dispute.

The general aim of these provisions is clear. They are intended to secure that a State shall not 'resort to war' without having first submitted its case either to international decision or at least to international consideration, or after such decision or consideration in defiance of its result. They leave open indeed certain cases (the so-called 'gaps' in the Covenant) in which resort to war is not in terms excluded, but by Art. XI the duty of the League to 'take any action that may be deemed wise and effectual to safeguard the peace of nations' in the event of 'any war or threat of war' remains applicable in such cases. They do not, as it is sometimes said, create any *right* to make war, and their practical importance is probably in any case not very great, for if another war should come, it is much more

likely to come in breach of the Covenant rather than through one of the 'gaps.' Finally, 'should any member of the League "resort to war" in disregard of its covenants under Art. XII, XIII, or XV' the sanctions of Art. XV become applicable.

In the Pact of Paris the parties

- (a) by Art. I 'condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another'; and
- (b) by Art. II 'agree that the settlement or solution of all disputes or conflicts of whatever nature . . . shall never be sought except by pacific means.'

It will be noted that, with the exception of Art. II of the Pact, all these provisions contain prohibitions of or limitations on actual war. They do not, at any rate in terms, affect the right of a State to resort to armed force, unless the armed force takes the extreme form of war. Recent events have now revealed the great importance of this omission, and it is becoming clear that if this vital distinction between the lawful and the unlawful use of force in the international field is to be made effective, even to the extent that its effectiveness rests on a satisfactory state of the law, it is not enough to define the position of war in the international system. The law must have a clear policy also on the wider question of the use of armed force in general, and to that end I suggest that we shall have to be prepared with answers to three questions:—

- (1) What is war in the legal sense?
- (2) What limitations, if any, does the present law impose on resort to armed force which does not legally amount to war?
- (3) What limitations on such measures are desirable and practicable for the future?

III.

As Dr. McNair³ has pointed out in a valuable article on 'The Legal Meaning of War,' 'war is a state or condition of affairs, not a mere series of acts of force.' How does this state of affairs come into existence in law?

Some of the events which will give rise to the state of war are clear. It will come into existence (1) if a State expressly declares war to exist; (2) if without an express declaration a

³ Grotius Society Transactions, Vol. 11, p. 29. A number of definitions by different writers are collected in the article.

State commits acts of force against another State and accompanies them by indications from which an *animus belligerendi* can be inferred, *e.g.* if it calls upon third States to observe the obligations of neutrality; (3) if a State commits acts of force without the *animus belligerendi*, but the State against which they are committed elects to treat such acts as having introduced a state of war.

So much seems to be clear. But what is not quite clear, is whether these three contingencies exhaust the possible ways in which war may begin.

In the present Sino-Japanese dispute it appears, so far as the facts are known, that none of these conditions has been satisfied. Are we therefore to conclude that there is no 'war' in the Far East? The question is one of great difficulty, and probably before the present dispute had arisen most international lawyers would have said that it related to a contingency so improbable that it was unnecessary to consider it. Yet for about six months now hostilities on a considerable scale have been carried on which, for different reasons on each side, but for reasons which it is not difficult to guess at in the peculiar circumstances of the case, neither party is prepared to recognize as war.

The layman is apt to regard the lawyer's doubts in this matter with impatience. Would anyone but a lawyer hesitate to describe what has been happening as 'war,' and is it not certain that at least when that term was used in the Covenant and the Pact it was intended, or would have been intended if the case had been foreseen, to cover the situation which has now arisen? The layman's instinct may possibly be right even in law, but the issue is not a mere technicality as he is apt to think. It may seem absurd to say that peace has not been broken in the Far East, but on the other hand it is well to remind ourselves that what has been happening there, deplorable as it is, does differ in important respects from what probably would have happened if there had been an avowed state of war. It differs in particular in the limited objective of the hostile operations, in the continuance of diplomatic relations between the parties, and in the fact that, so far as is known, no claim to interfere with the normal rights of third States has been put forward on either side. These are not technical, but very practical differences.

In any case lawyers are bound to try to answer the question on legal grounds. Dr. McNair in the article already quoted, after mentioning certain authorities which I shall not repeat,

concludes (1) that the State against which measures of force are taken has an option to treat them as war; (2) that the State which takes such measures does so at its peril—that is, at the peril of having initiated a war if the other State elects to regard them as war; (3) that that State may manifest its election in favour of war, *either by repelling force by force*,⁹ or by a declaration that it regards the measures as war; (4) that if it elects for war, its election has a retroactive effect, and the state of war arises on the commission of the first act of force. There can be no doubt that these propositions correctly state the law, but they are not decisive of the actual point which has arisen in the Sino-Japanese dispute. China has ‘repelled force by force,’ but it appears that in doing so she did not intend to manifest an election in favour of treating the original force used by Japan as having initiated war, and I do not understand Dr. McNair to suggest that the act of ‘repelling force by force’ raises more than a presumption of an intention to elect for war. In the present case it does not seem possible to attribute that intention to China. We are confronted then with this question: must we say that if acts of force are sufficiently serious and long continued, then, even if both sides disclaim any *animus belligerendi* and refuse to admit that a state of war has arisen between them, there comes a point at which the law must say to the parties, ‘you are refusing to recognize the facts; your actions are of a kind which it is the policy of the law to characterize as “war” ; and therefore, whatever you choose to say about it, you have in fact set up a state of things which in the eye of the law is a state of war’?

Whatever may be the true answer to that question—and I am inclined to think that the answer ought to be in the affirmative—it may be that for the proper interpretation of the term ‘resort to war’ in the Covenant, the existence or non-existence of a legal ‘state of war’ is not absolutely decisive. The main reason which has made it necessary for the law to distinguish very definitely between a state of war and a state of peace lies in the necessity for safeguarding the interests of third parties not engaged in the hostilities; if there is a state of war, but not otherwise, third parties are neutrals with the rights and duties created by the laws of neutrality. But when the authors of the Covenant used the term ‘resort to war,’ they were not concerned with the law of neutrality; they were concerned with the much more general problem of the establishment of peace

⁹ The italics are mine.

between nations, and it may be therefore that a State 'resorts to war' within the meaning of the Covenant, if it resorts to acts which are intrinsically 'warlike' in character, even though a 'state of war' does not result from such acts owing to the refusal of the other State to treat them as having introduced it. 'To resort,' according to the Oxford English Dictionary, is 'to have recourse to something for assistance or furtherance of an object'; and when a State 'resorts to war,' it is to objective acts of a certain kind and not to the creation of a certain legal result that it looks 'for assistance or furtherance of its object.' It would not, I think, be straining the interpretation of the phrase 'resort to war' to say that it means 'resort to warlike acts' whether or not those acts lead as a legal consequence to a state of war.

IV.

Does the present law impose any limitations on resort to armed force which does not amount to war? I have already referred to the unsatisfactory state of the customary law on this matter and to the limitation imposed by the second Hague Convention, and I have suggested a doubt whether in the Covenant the term 'resort to war' ought not to be interpreted as extending to acts which are intrinsically acts of a warlike character.

Art. II of the Pact of Paris seems at first sight to be another clear limitation. Certainly the ordinary man would expect 'pacific means' to mean 'non-violent means,' and not merely 'means which do not amount legally to war'; and this view is perhaps supported by the following words in the preamble to the Pact, 'convinced that all changes in their relations with one another should be sought only by pacific means, and be the result of a peaceful and orderly process'; for even if we can bring ourselves to say that the use of armed force may be a 'peaceful,' it certainly is not an 'orderly process.' On the other hand we must remember that the law knows of no state intermediate between peace and war, and it may be argued that means which do not amount to war must necessarily in law be classed as 'pacific.' The word would then bear the same meaning as in the term 'pacific blockade,' where it obviously does not exclude the use of force. Further it is not very easy to believe that the parties, having in Art. I renounced 'war' but not apparently anything else, intended to go further and rule out other measures besides war in Art. II. The intention receives no elucidation from the diplomatic correspondence which

preceded the Pact, nor, of course, has it received any authoritative interpretation since. Probably the fact that the term 'war' does not cover *all* measures of violence was not present to the mind of any of the parties.

After the bombardment and occupation of Corfu in 1923 the Council of the League remitted certain questions to a commission of jurists for advice. The fourth question raised precisely the point under consideration here; it was:—

'Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Arts. XII to XV of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in these articles?'

The answer given by the commission to this question was:—

'Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Arts. XII to XV of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.'

This answer is unfortunately obscure, but one of the members of the commission of jurists, Prof. Ch. de Visscher, has told us in an interesting article¹⁰ what he at least understood by it. He begins by pointing out that traditional international law has never had any solidly based theory of the use of measures of coercion. It has been influenced by political opportunism. Hitherto, however, such measures have found some juridical justification in two ways: (a) in the inadequate development of pacific methods of settling international differences; resort to force has, therefore, often been the only possible way in which a State could obtain satisfaction for an injury; and (b) in the fact that States in the past have had an absolute right to resort to war, and measures of force falling short of war were certainly preferable to war.

But neither of these justifications is now valid in the new juridical order instituted by the Covenant, for Art. XII has created an obligation to submit all differences to one or other of the procedures there mentioned, and it has taken away the old absolute right to make war. There is no weight in the objection that it may be impossible for a State to await the expiration of the stipulated period of delay before resorting to force, for this

¹⁰ *L'interprétation du Pacte au lendemain du différend italo-grec.* Revue de dr. int. et de lég. comp. 1924, p. 377.

is to confuse reprisals with legitimate defence, which remains unaffected. Hence, he concludes, it is clear that armed reprisals are incompatible at least with the spirit of the Covenant. But are they actually incompatible with its terms? Prof. de Visscher thinks that they are for the following reasons. Art. XII, in imposing the obligation to resort to one or other of the pacific procedures there indicated, must by necessary inference impose at the same time a duty to abstain from any measure of which the natural effect would be either to provoke an immediate rupture, or to impede the course of the procedure laid down by the Article and thus to compromise the chances of its successful operation. Armed force would certainly have this effect; and we must take it therefore that the article, by implication but indisputably, enjoins abstention from acts of force until the award or decision or the report of the Council is rendered. This gives us the test of the legitimacy or otherwise of measures of coercion under the Covenant, which is implied but not made explicit in the answer of the jurists, for we must conclude that those which are calculated to lead to an immediate rupture or to impede the course of the pacific procedure prescribed are forbidden. The distinction must lie in the intrinsic character of the measures themselves, and armed reprisals must be condemned, whereas economic or financial measures may still be legitimate because they do not necessarily conflict with the operation of the article.

This argument is entitled to the most serious consideration, both because of its author's position as a member of the commission and also, if I may say so, because of its intrinsic reasonableness. It is independent of the question whether the prohibition of 'resort to war' ought to be interpreted to cover all measures of resort to 'warlike' acts, and rests on a theory of the implied incompatibility of such measures with the positive obligations imposed by Art. XII.

V.

This article has raised more questions than it has attempted to answer, for the truth is that events have revealed to us a lacuna in the law which had hardly been suspected, and it is perhaps more profitable to consider what the future law ought to aim at than to argue about the meaning of the present. *De iure condendo* therefore I make the following suggestions.

- (1) We ought *not* to aim at the total abolition of measures

of force falling short of war, for, as Dr. McNair has suggested, it may be desirable to give them an important place in the League's armoury of sanctions.

(2) Though Art. XII will certainly bear the construction that Prof. de Visscher desires to put on it, I hesitate to say that it is the only possible construction, and at present we have to face the regrettable fact that the commission of jurists of which Prof. de Visscher was a member has not adopted it in unequivocal terms. Their answer was ambiguous,¹¹ but having been adopted by the Council, it is at present our most, in fact apart from the article itself our only, authoritative text. I should like to see a resolution, either of the Council or of the Assembly, elucidating the answer of the jurists in the sense contended for by Prof. de Visscher. As long as it is even doubtful whether the Covenant requires States to abstain from armed force or only to abstain from actual war during the prescribed period of delay, so as to give its peaceful procedure a fair chance of success, there is a serious lacuna in our legal machinery for the protection of peace.

(3) The prohibition of the use of armed force as a means of applying pressure or obtaining redress cannot, however, extend to a prohibition of its use in legitimate defence. Nor is it practicable, I think, to aim at a definition of self-defence, nor even at the requirement of some form of prior League authorization before measures of defence are taken, for the occasions of such measures may arise suddenly and brook no delay. That consideration raises a question of great difficulty, for if on the one hand the right of self-defence is a door which we dare not close, it is on the other hand one which it is unfortunately very difficult to keep merely ajar. It expands very easily, as Sir Norman Angell once said, into 'the defence of a foreign policy which a nation thinks indispensable to its interests and the right to be the judge of those interests.' What, however, might be aimed at is the acceptance, whenever a State is impelled to resort to armed force in self-defence, of an obligation to communicate all the facts of the situation to the League. We cannot in the present state of international organization, or probably for a long time to come, demand the international control of a State's action in such a case, but it is not unreason-

¹¹ So ambiguous that Dr. McNair seems to interpret it in a sense exactly the opposite of that which Prof. de Visscher at least intended it to bear. He regards it as 'putting plainly on record' that Art. XII is 'not necessarily violated by the use of coercive measures, even when—I think we may justifiably infer from the circumstances giving rise to the interpretation by the jurists—those coercive measures involve the application of force': *loc. cit.* p. 43.

able to insist that what it does is 'a matter of concern to the whole League' which ought to be submitted to discussion in an international forum, and if necessary to criticism or to 'any action that may be deemed wise and effectual to safeguard the peace of nations.' This action was in fact taken by Great Britain in a communication addressed to the Secretary-General of the League on February 8, 1927, explaining the reasons which had led to the dispatch of the Shanghai Defence Force.¹² It is in sharp contrast with the attitude of Japan in the present dispute. Moreover, as the Sino-Japanese dispute has only too clearly shown, it is not only the original alleged justification for resorting to measures of defence, but the length to which those measures are subsequently carried, that calls for international supervision.

(4) The great difficulty of establishing any effective legal control over the resort to armed force in the past has been that international law offered no effective alternative way of securing the redress even of a legitimate grievance. This difficulty has been reduced by the new order introduced by the Covenant, but it has not been eliminated. The League does not yet offer an effective alternative either to war or to measures of force which do not amount to war. The full solution of this difficulty is not yet even in sight, but it is the fundamental difficulty which lies at the very heart of the whole problem of peace. We are too apt to think of war merely as an evil thing which can, though the task may be difficult, be excised from the international system. We overlook the fact that war has performed a necessary social function in the past, and that if we would eliminate it for the future we shall have to provide an alternative procedure for performing that function. War has been one of the means whereby from time to time States have revised the established international order. The analogy to war in the domestic sphere is neither the crimes nor the disputes of individuals; it is revolution, and our safeguard against revolution, such as it is, is our readiness to meet legitimate grievances by ordered change in the established order. For that our instrument is a legislature, and we shall not have solved the problem of peace until we have devised, not indeed any servile imitation of a national legislature in the international sphere, but some substitute for it, some ordered process whereby we can satisfy the demand for change which is the mark of any living human

¹² The letter is quoted by Toynbee, *Survey of International Affairs*, 1926, at p. 380.

society.¹³ The Covenant has recognized the problem in Art. XI, para. 2, which declares it to be 'the friendly right of each Member of the League to bring to the attention of the Assembly or the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends,' and again in Art. XIX under which 'the Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.' But we are as yet far from having recognized all that these provisions ought to mean.

¹³ I have attempted to discuss this question in an article on 'The Legislative Function in International Relations,' published in *Problems of Peace*, 5th series pp. 205—229 (Oxford University Press).

UNDISCLOSED PRINCIPALS IN CONTRACT.

A. L. GOODHART and C. J. HAMSON.

INTRODUCTORY.

THE comparatively recent case of *Collins v. Associated Greyhound Racecourses, Ltd.*¹ has raised in a forcible manner two old difficulties—namely, the legal position of undisclosed principals, and, as a corollary, the meaning of ‘personality,’ especially in contracts involving undisclosed principals.

We are here concerned with a situation in which A, an undisclosed principal, employs B, an agent, to contract with C, a third party, in B’s own name. By ‘undisclosed principals’ here are meant principals whose *existence* is not known to the third party and *not* principals who, known to be existent by the third party, are nevertheless not identified by name. By ‘agent’ is meant a person who in his own name contracts ostensibly for his own account, but behind whom there stands an undisclosed principal.

Before discussing *Collins’ Case*¹ we propose first to examine the general position of undisclosed principals.

GENERAL PROPOSITIONS TOUCHING UNDISCLOSED PRINCIPALS.

(1) In certain cases an undisclosed principal is allowed to intervene on a contract made by his agent. The allowance of such intervention is certainly an anomaly² in the law of contract as understood in England. Indeed it was at first considered a grave injustice: witness the early case of *Scrimshire v. Alderton*.³ There the defendant bought from one Hunt some oats which, though belonging to the plaintiff, were sold by Hunt (to whom they had been consigned) as if they were his own. After the sale, but before payment by the defendant, the plaintiff gave notice to the defendant to pay the price to him, the plaintiff; but the defendant insisted upon paying, and did pay, to Hunt, as being the person with whom he had contracted. Hunt failed, and the plaintiff now claimed the price from the

¹ [1930] 1 Ch. 1.

² See *Keighley Maxsted & Co. v. Durant*, [1901] A. C. 240.

³ (1743) 2 Stra. 1182.

defendant. Lee C.J. directed the jury to find for the plaintiff; but the jury, though sent out three times and individually interrogated by the Chief Justice, refused to find for the plaintiff, the undisclosed principal; and even a special jury in a new trial still found against him.

Nevertheless it is clear that justice is often served by allowing the undisclosed principal to be paid directly by the third party, especially in cases where the agent was used as a factor and fails before payment by the third party. In such cases, the principal would recover only a dividend in the bankruptcy of the agent if he were not allowed to receive the price directly from the third party. The third party is, no doubt, willing to pay the principal directly; and there seems to be no reason in justice why the other creditors of the agent should take a benefit from the money which, in common sense, belongs to the principal alone as the price of his goods.

(2) If the principal has a right to be paid directly by the third party, he should also have the means, without which a right is barren, of enforcing that right. It was therefore early decided that the principal could sue the third party, so much so that in 1785 Lord Mansfield⁴ could treat that question as 'long settled.' However, his namesake, Mansfield C.J., in 1809—1810 doubted whether *partners* could sue jointly on a contract (within the scope of the partnership) made by one of them in his own name.⁵ Having perhaps the Roman Law of the 'institor' in mind, he said⁶:

'There is a material distinction between the case where partners are defendants, and where partners are plaintiffs: if you can find out a dormant partner defendant, you may make him pay, because he has had the benefit of your work: but a person with whom you have no privity of contract shall not sue you.'

This was a reasonable distinction and was followed by Lord Ellenborough C.J. in *Lucas v. De la Cour*,⁷ where partners suing jointly on a contract made by one of them in his own name were nonsuited. But the distinction was rejected, and the doubt as to the ability of partners to sue jointly in such circumstances was finally allayed, in *Skinner v. Stocks*.⁸ However, in spite

⁴ *Rabone v. Williams* (1785) 7 T. R. 360.

⁵ *Mawman v. Gillett* (1809) cited 2 Taunt. 325; *Lloyd v. Archbowle* (1810) 2 Taunt 324.

⁶ *Lloyd v. Archbowle* (1810) 2 Taunt. 324, 327.

⁷ (1813) 1 M. & S. 249.

⁸ *Per cur.* (1821) 4 B. & Ald. 437; followed in *Cothay v. Fennell* (1830) 10 B. & C. 671.

of that decision, the Court may make such joint suit in fact impossible by demanding strict proof that the contract *was* joint, as for example in *Sims v. Bond*,⁹ where it was in fact impossible for co-lenders to sue jointly on a loan made by one of them.

This early hesitation is evidence, fully to be corroborated by subsequent events, that there is a good deal of complexity in the theory of undisclosed principals.

(3) It was also decided that if the undisclosed principal can and does sue, he may be met by any defence which (before notice of his existence) was available against the agent. So Lord Mansfield¹⁰:

‘Where a factor, dealing for a principal but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal.’

It is said that the purchaser shall not be, and is not, prejudiced by the intervention of the principal. No doubt it is no hardship to pay to A a sum of money which is payable to B. But in fact the purchaser may be put into a difficulty by being in doubt whom he ought to pay. He cannot say: ‘I know only B, and I shall pay B only.’¹¹ The same hardship occurs in the case of assignment of a debt.¹² But in neither case does the law recognize it as a hardship. It must be concluded that the possibility of the purchaser having to pay a person who is to him a stranger is not, in law, a prejudice to the purchaser, whatever commercial hardship that possibility may in fact entail.

Touching set-off, it is sufficient for our present purposes to notice that when a set-off is allowed, it is allowed only: (i) if the purchaser did not know that the agent was an agent: it matters not if the purchaser did not know that the agent was the agent of A, so long as the purchaser knew that the agent was not the principal¹³; and (ii) if the purchaser *believed* the agent to be the principal—simple absence of belief one way or

⁹ (1833), 5 B. & Ad. 389.

¹⁰ In *Rabone v. Williams* (*supra*) cited in *George v. Clagett* (1797) 7 T. R. 359, which see in 2 Smith L. C. (13th ed.) 131.

¹¹ See *Scrimshire v. Alderton* (*supra*), 2 Stra. 1182.

¹² See *Brice v. Bannister* (1878) 3 Q. B. D. 569.

¹³ *Maanss v. Henderson* (1801) 1 East 335 (but simply a general knowledge that the agent acts sometimes as a factor is not sufficient to bar set-off; see *Moore v. Clementson* (1809) 2 Camp. 22, at p. 24); *Semenza v. Brinsley* (1865) 18 C. B. (N.S.) 467; *Mildred v. Maspons* (1883) 8 App. Cas. 874, esp. at p. 888.

the other will preclude the purchaser from setting off against A¹⁴; and (iii) probably if the purchaser was reasonable in believing the agent to be the principal.¹⁵ In the cases the distinction between a factor who has possession of the goods or documents of title, and the broker who has not, is emphasized.¹⁶ No doubt the purchaser would find it difficult to claim a set-off if after buying goods from a simple broker he affected to believe that the broker was the principal.

Further, it is clear that only that may be set off against the principal which was available as a defence against the agent *before notice of the principal*.¹⁷ The set-off against the undisclosed principal is similar to the equity which may be claimed against the assignee, except that it may be doubted whether this set-off is not larger than that equity as established in *Stoddart v. Union Trust*.¹⁸ The most usual kind of set-off claimed is one arising from an antecedent debt owed by the agent to the purchaser.

(4) Before the third party has notice of the principal, the agent has power¹⁹ to vary the terms of the contract, and the principal is bound by the variation. Similarly, payment to the agent before notice of the principal is a good discharge of the third party.²⁰ But notice of the principal operates to fix the contract of the agent and the third party, so that the agent and third party cannot, by agreeing together, alter or rescind the contract which sprang from their previous agreement²¹; and of course, as we have seen, the third party may no longer obtain a discharge by payment to the agent in contravention of the order of the principal.

Notwithstanding this fixation of the contract, upon notice of the principal, it would appear that the contract is still a contract between the third party and the agent, though no longer now subject to their power of variation. Notice of the principal thus operates much as notice of assignment operates in fixation of the contract between assignor and original contractor. It

¹⁴ *Cooke v. Eshelby* (1887) 12 App. Cas. 271.

¹⁵ This last proviso is doubtful. It does not mean that the purchaser is bound by constructive notice of the agency. It is clear that he is not bound by such notice (*Greer v. Downs Supply Co.* [1927] 2 K. B. 28, and the cases there cited) though an imputed knowledge is sufficient to bind him (*Dresser v. Norwood* (1864) 17 C. B. (N.S.) 466; *Moore v. Clementson* (1809) 2 Camp. 22).

¹⁶ E.g. in *Baring v. Corrie* (1818) 2 B. & Ald. 137; *Escot v. Milward* (1783) Esp. Digest, 107, cited in *George v. Clagett* (*supra*) note 10.

¹⁷ See further, below.

¹⁸ [1912] 1 K. B. 181.

¹⁹ *Blackburn v. Scholes* (1810) 2 Camp. 341; *Taylor v. Kymer* (1832) 3 B. & Ad. 320.

²⁰ *Coates v. Lewes* (1808) 1 Camp. 444.

²¹ *Dyster v. Randall* [1926] Ch. 932.

will be pertinent to remember that the fixation upon notice of assignment has never been taken to imply that the original contract was 'really' or 'in effect' or 'in point of law' a contract between the original contractor and the assignee: that contract remains, what it always was, a contract between the original contractor and the assignor, and indeed quite 'personal' to them, in the sense that it bound each to the other and to nobody else.

(5) There is a primary liability of the agent personally to the third party. This proposition has never been doubted, however much its significance has been obscured. That liability the agent can never escape by any act of his own. No doubt the third party may, upon disclosure of the principal, be put to his election²²; and no doubt if he unequivocally adopts the principal as the party liable to him, he may not thereafter sue the agent. But such adoption is the free act of the third party: he may have the personal and exclusive liability of the agent so long as he desires it.

Not only does the disclosure of the principal not interrupt the agent's liability, but the principal is not allowed to intervene if the intervention will deprive the third party of the agent's liability. This point was settled long ago by the excellent judgment of Lord Redesdale in *O'Herlihy v. Hedges*.²³ There the plaintiff had conveyed his estate to Riordan upon a secret trust. Riordan as apparent owner of the plaintiff's estate had entered into an agreement for a lease with the defendant. The plaintiff, having first established that Riordan held for his benefit, sought now to intervene, and claimed specific performance of the lease by the defendant to himself, the plaintiff. Lord Redesdale refused specific performance, saying²⁴: 'It is clear that Hedges cannot be compelled to perform this agreement unless he has covenants from Riordan as a man of substance for the performance of these terms (*i.e.* lessee's covenants), . . . though if the lease had been executed Riordan would have been bound and then the plaintiff would have a right to an assignment on indemnifying Riordan from the covenants . . .,' and he goes on to ask the very pertinent question²⁵: 'Surely the landlord has a right to say, "I never would have entered into such a contract with you" (*i.e.* plaintiff O'Herlihy)?'

Certainly in Lord Redesdale's mind there is no doubt that

²² On election, which is not material to be here further discussed, see *Paterson v. Gandasequi* (1812) 15 East 62 in 2 Smith L. C. (13th ed.) 322.

²³ (1803) 1 Sch. & Lef. 123.

²⁴ At p. 128.

²⁵ At p. 131.

the contract is between the ostensibly contracting parties, and that that contract cannot be specifically enforced without enforcing one of its essential terms—namely, that the third party shall have, if he desires it, the liability of the ostensible contractor.²⁶

This rule, that the agent is liable on the contract and that the third party shall not be hindered from having the agent's liability if he desires it, is important to an understanding of *Collins' Case*.

(6) The doctrine of undisclosed principal is limited to a very important extent by the rule that no man may sue²⁷ or be sued²⁸ as undisclosed principal on a contract made by an 'agent' unless that 'agent' was in fact his authorized agent *at the time of the formation of the contract*. This rule was finally declared in the case of *Keighley Maxsted and Co. v. Durant*.²⁸

No doubt, if undisclosed principals are allowed, there is no reason in logic why a precedent authority should be required: as Scrutton L.J., when counsel, very well argued in *Durant's Case*²⁸—which argument convinced the Court of Appeal,²⁹ though not the House of Lords. For it is, of course, true that the third party, whether or no there is actual authority, is in any case as ignorant of the express authority as he is of the existence of an undisclosed principal. But, as was said by Lord Halsbury in *Durant's Case*³⁰: 'If it is said that [the requirement of a precedent authority] is an anomaly, it certainly is not the only one in our law; and if it were sought to make our laws harmonious by deciding that any proposition which our laws establish involves as a necessary consequence the establishment of everything that is analogous to it, the result would be very perplexing indeed.'

If this rule did not exist, any person might intervene in any contract by agreeing with one of the contracting parties to give and accept a retrospective authority. This intervention, if allowed, would vastly extend the scope of the doctrine of undisclosed principals. Undisclosed principals being an

²⁶ In *Dowell v. Dew* (1842) 1 Y. & C. C. C. 345; 12 L. J. Ch. 158, Knight-Bruce V.-C. followed Lord Redesdale. In *Crosbie v. Tooke and Morgan v. Rhodes* (1833) 1 My. & K. 431, 435, specific performance of agreements for a lease was given though the original contractor had become bankrupt. These cases do not contradict the rule above stated. In *Buckland v. Papillon* (1866) L. R. 1 Eq. 477; 2 Ch. App. 67, an objection *ore tenus* by the defendant for want of parties was overruled. This objection, if it had been properly taken, ought no doubt to have been allowed. Fry, Specific Performance, seems to state the result of these cases correctly in § 227: *quaere* as to § 229.

²⁷ *Saunderson v. Griffiths* (1826) 5 B. & C. 909; *Heath v. Chilton* (1844) 12 M. & W. 632.

²⁸ *Keighley Maxsted & Co. v. Durant* [1901] A. C. 240.

²⁹ [1900] 1 Q. B. 629.

³⁰ [1901] A. C. 240, 244.

anomaly, it was considered wise not to extend that anomaly, even at the expense of an apparent inconsistency.

(7) The undisclosed principal may in general intervene to sue³¹ or be sued³² even on a contract of which the enforceability depends on the existence of a memorandum in writing containing, *inter alia*, the name or description of the parties. But the agent whose name appears in the contract as the contracting party cannot escape his liability by giving evidence that there was in fact an undisclosed principal.³³ It is said that such evidence cannot be allowed to be given by the agent because it would be oral evidence contradicting a written document: which in general is not permissible. A better reason, perhaps, would be that such evidence would contradict the whole contract, whether in writing or not.

There is, in the cases dealing with written memoranda, an instructive distinction between the situation where the agent purports to act on behalf of his 'vendor' (not otherwise sufficiently described) and where the agent acts in his own name only. In the former case, there is no enforceable contract; for clearly there is no contract between the agent and the purchaser, the agent acting expressly as agent; and there is no sufficient memorandum of a contract between the vendor and the purchaser, for lack of a sufficient description of the vendor.³⁴ But in the latter case, the vendor as undisclosed principal *can* intervene and sue.³⁵ Why? Surely because there is then a good contract in writing *between the purchaser and the agent*, and the undisclosed principal, so far from contradicting that contract, relies upon it, as much as would an assignee from the agent.

Again, therefore, it is to be noticed that the contract on which the undisclosed principal intervenes is a contract between the agent and the purchaser. It is not a contract between the purchaser and the undisclosed principal. For it would be absurd to suppose that the principal is sufficiently described when he is neither named nor described nor mentioned at all, but that he is insufficiently described when he is mentioned and described as 'vendor.'

³¹ See *e.g.* *Bateman v. Phillips* (1812) 15 East 272; *Garrett v. Handley* (1825) 4 B. & C. 664.

³² *Calder v. Dobell* (1871) L. R. 6 C. P. 486; *Wilson v. Hart* (1817) 7 Taunt. 295.

³³ *Higgins v. Senior* (1841) 8 M. & W. 834.

³⁴ *Coombs v. Wilkes* [1891] 3 Ch. 77; *Potter v. Duffield* (1874) L. R. 18 Eq. 4, where though the decision is correct Jessel M.R.'s general remarks are much too large.

³⁵ *Filby v. Hounsell* [1896] 2 Ch. 737.

However, an undisclosed principal is not allowed to intervene if the contract contains as one of its terms a description of the agent such that the term would have to be contradicted before intervention by the principal would be possible: for example, if the agent of the owner of a ship, in a contract hiring the ship to charterers, describes himself as owner of the ship, the owner cannot intervene as undisclosed principal by showing that he was in fact the owner.³⁶ But the description which precludes the undisclosed principal must be 'unambiguous': so where the agent described himself as 'charterer,' his principal was allowed to intervene; for it was held that the description was not exclusive.³⁷ This last rule is probably more odd in its application than irrational in its theory.

(8) Further, when the principal employs an agent to purchase goods, there is a duty on the principal—though this duty is disputed and denied—to see the third party actually paid. Payment by the principal to the agent is not usually payment to the third party, unless the third party actually receives the money.³⁸

This duty, which is further discussed below,³⁹ is not difficult of reasonable explanation upon any theory of undisclosed principals. The principal knows that there is a third party who has parted with goods upon the faith of a future payment; he knows that these goods are now in his hands; he knows that the third party has a claim against him. If he meets this claim by payment to another person upon faith that that other will pay the third party, and he is deceived in that expectation, the loss arising from that deception falls more properly upon him than upon the third party who has done, by supposition, nothing whatever to mislead him.

The mere existence of this duty, if it exists, is not proof that the contract in which the undisclosed principal is intervening is a contract between the undisclosed principal and the third party.

Some addition will be made to these general propositions when we go on to examine the meaning of personality and the general theory upon which the doctrine of undisclosed principals rests. Meanwhile it is proposed to examine more exactly the

³⁶ *Humble v. Hunter* (1848) 12 Q. B. 310; *Formby v. Formby* (1910) 102 L. T. 116. *Quære* if a co-owner would have been admitted to intervene?

³⁷ *Drughorn v. Rederi. Trans-Atlantic* [1919] A. C. 203; and see further below at p. 356.

³⁸ *Heald v. Kenworthy* (1855) 10 Exch. 739; and see discussion in *Irvine v. Watson* (1880) 5 Q. B. D. 414.

³⁹ Below at pp. 328 *sqq.*

three types of contract in which the undisclosed principal is usually involved, namely:

(a) The most common, where the undisclosed principal uses an agent to *sell* in the agent's name the goods of the principal.

(b) Where the agent used by an undisclosed principal employs a sub-agent without informing him of the principal's existence.

(c) Where the undisclosed principal instructs an agent to *buy* for the principal in the agent's own name the goods of a third party.

THREE TYPES OF CONTRACT WHERE UNDISCLOSED PRINCIPALS APPEAR.

A. Where the principal uses an agent to sell.

In this type, the agent is known as a factor whose position is now defined in the Factors Act, 1889.⁴⁰ It is, however, not necessary to compose a commentary on that Act in order to notice the following points:

(i) There is, most unfortunately, in English law no general estoppel against a person who, whether by his carelessness or by his deliberate act, invests another person with such possession of personal property or the documents of title thereto as to enable that other to appear as the owner thereof and by that false appearance to deceive the persons dealing with him. It is indeed true that the pious principle expressed by Ashhurst J. in *Lickbarrow v. Mason*⁴¹ that 'whenever one of two innocent parties suffers by the act of a third person, he who has enabled such person to occasion the loss must sustain it' has by subsequent decisions⁴² become a 'generality which is but a sound in the air.' Reason and justice would demand that the owner in such cases should not be allowed to destroy the appearance which he has created nor to retrieve the property from the persons who, relying upon that appearance, have, as they believed, acquired the ownership of that property in a careful, prudent and reasonable way. But it is certain that such a rule of justice and reason is not part of the common law: that is to say, the mere giving of possession, even by deliberate act, of personal property, even of property which passes by delivery (not being a negotiable thing) will not be construed as giving to the person who has

⁴⁰ 52 & 53 Vict. c. 45.

⁴¹ (1787) 2 T. R. 63.

⁴² E.g. *Swan v. North British Australasian Co.* (1863) 2 H. & C. 175.

possession general authority so to deal with the property as irrevocably to bind the owner.⁴³

(ii) Still, even the common law thought it right to say that if you with full consent invest a merchant with the possession of goods intending that he should sell them for you, you must be taken to have given him a general authority to *sell*; and that a sale made by him, even if not according to your express instructions⁴⁴ and against your interest, but made while your authority continued, is nevertheless binding upon you, unless the purchaser took with notice.⁴⁵

(iii) So that at common law a factor to whom goods were consigned for sale had a general authority to sell; but he had not authority to *pledge*,⁴⁶ not even for a present advance.⁴⁷ Much less had he authority to pledge for an antecedent debt owed by him, an authority which he does not possess even under the Factors Act, 1889. Accordingly some difficult questions arose whether a transaction was a pledge simply or a sale upon which a part of the purchase money had been paid.⁴⁸

(iv) The Factors Act gave him authority to pledge, but limited that authority to pledges for present advances. The limitation, upon principle, is no doubt illogical; for if he has authority to pledge he ought by analogy to have a general authority to pledge. The statutory authority to pledge was, however, in fact limited; so that on this point some pretty questions arose whether the transaction amounted to a pledge for a present advance or was for an antecedent debt.⁴⁹

(v) The real line of division between the cases is, for our purposes, this: whether the factor was acting within the authority given to him by statute or common law or outside it. If outside, then the owner of the goods was not suing as an undisclosed principal within our meaning: he was simply recovering for a trespass done to his goods. It would be idle in that case to discuss whether the 'purchaser' was entitled to set off the antecedent debt of the factor: if the factor acted outside the

⁴³ There could, of course, be such a rule without in any way upsetting the doctrine of trusts.

⁴⁴ *Ex p. Dixon* (1876) 4 Ch. D. 133, discussed in *Stevens v. Biller* (1883) 25 Ch. D. 81.

⁴⁵ This is intended as a general statement and not as an accurate account of the numberless cases dealing with the subject.

⁴⁶ *Paterson v. Tash* (1743) 2 Stra. 1178.

⁴⁷ *Martini v. Coles* (1813) 1 M. & S. 140; *Shipley v. Kymer* (1813) 1 M. & S. 484.

⁴⁸ See e.g. *Shipley v. Kymer* (*supra*).

⁴⁹ Compare e.g. *Jewan v. Whitworth* (1866) L. R. 2 Eq. 692, with *Macnee v. Gorst* (1867) L. R. 4 Eq. 315.

authority so given to him, the person taking the goods was not a purchaser.

Usually the owner, when he claimed that his factor acted outside authority, sued in *trover*; and if he succeeded in *trover*, there could be strictly no question of set-off. If the agent acted within authority, the owner was by exception allowed to sue in *assumpsit*—by exception, for it is an anomaly that he should then be allowed to sue at all. If the owner succeeded in *assumpsit*, the third party (who would then be a purchaser) was allowed to set off the antecedent debt of the factor.

It is not pretended that the cases invariably follow this distinction of *trover* and *assumpsit*: for example, in *Shipley v. Kymer*⁵⁰ the plaintiff sued in *assumpsit* although there the transaction was outside the factor's authority as then conceived, and he was in reality claiming against the transaction; there he recovered in *assumpsit* although the defendant was *not* allowed to set off the money paid to the factor. But it is suggested that that distinction is the logical division: whether the owner was suing *on* a transaction which the factor was, from time to time, authorized to make, or *against* a transaction which was outside that authority.

It is only with suits *on* transactions *within* authority that we are concerned. By 'authority' we mean not so much the express authority given to the factor by the owner, as that authority which arose in the factor either at common law or by statute when goods were consigned to him by an owner for sale. It is from such suits only that the doctrine of undisclosed principal arose; and in such suits, where the owner was what we mean by an undisclosed principal, the owner recovered only if he allowed every set-off which could have been made against the factor before notice of the principal.⁵¹

B. Where the principal's agent uses a sub-agent.

There is no generic name for this type of situation; though in the cases the persons involved are often the undisclosed principal and the broker employed by the factor to sell the principal's goods in the factor's name.

(i) Again, the question of the agent's authority is all important. But here again there is a confusion,⁵² and a distinction must be taken, in the meanings of an agent's authority. The

⁵⁰ (1813) 1 M. & S. 484.

⁵¹ See *George v. Clagett* (*supra*, note (9)) in Smith L. C.

⁵² For an example see *Ecossaise S.S. Co., Ltd. v. Lloyd, Low & Co.* (1890) 7 T. L. R. 76.

agent may have 'authority'—though it is preferable to say 'permission'—to perform the duties of his agency vicariously. That is not the kind of authority with which we are here concerned. Whether in a particular case the agent has this permission to perform vicariously is a question outside our scope; reference on that question may be made to the general discussion in *De Bussche v. Alt*,⁵³ though in that case the point at issue was also whether there was authority within our second meaning.

(ii) Authority within our second meaning is authority in the agent to establish a 'direct' relation between the principal and the sub-agent. It is of course true that if the agent cannot employ a sub-agent at all, if he has not permission to perform vicariously, *a fortiori* he cannot establish a 'direct' relation between the principal and the sub-agent. But it does not follow that where he can perform vicariously, he can necessarily also establish this 'direct' relation. For example, in *Mackersy v. Ramsays*,⁵⁴ the appellant employed the respondent in Scotland to collect a bill drawn upon X in India. The appellant knew that the respondent would have to employ other persons actually to collect the money. The respondent in fact employed A, who in his turn employed B. X duly paid the money to B. B failed before remitting the money to the respondent. The respondent attempted to show that payment by X to B was in law payment to the appellant, and that the appellant had no further claim against the respondent. But the House of Lords allowed the appellant to set off against the respondent in account the full value of the bill as if it had actually been received by the respondent; and Lord Campbell said⁵⁵:

'The general rule of law that an agent is liable for a sub-agent employed by him is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself without employing a sub-agent. . . .'

Similarly in *New Zealand and Australian Land Co. v. Watson*,⁵⁶ where the plaintiffs consigned some wheat to Matthews and Thielman as factors and the factors employed the defendant as broker, it was held that the plaintiffs could not sue the defendant, because, as Bramwell L.J. said⁵⁷:

⁵³ (1878) 8 Ch. D. 286, 310—311; see also *Parker v. Kett*, 1 L. Raym. 658; *Ex p. Sutton* (1788) 2 Cox 84; *Henderson v. Barnewall* (1827) 1 Y. & J. 387; *Burial Board of St. Margaret's v. Thompson* (1871) L. R. 6 C. P. 445; *Quebec and Richmond R. R. Co. v. Quinn* (1858) 12 Moo. P. C. 232.

⁵⁴ (1843) 9 C. & F. 818.

⁵⁵ At p. 845.

⁵⁶ (1881) 7 Q. B. D. 374. This case must be taken strictly on the point of authority, for here, as the jury found, the defendant knew that the factors were acting as factors.

⁵⁷ At pp. 380—381.

'In this case Matthews and Thielman at Glasgow were not employed to make a contract of brokerage between the plaintiffs and the defendants. It may have been no breach in their agreement with the plaintiffs to employ a sub-agent, but they had no authority to make a contract between the two.'

(iii) Commonly, the agent has not this authority, and therefore according to the general rule established in *Durant's Case*,⁵⁸ where there is no authority, the employer of the agent cannot be allowed to intervene in the contract established between the agent and sub-agent, nor conversely can the sub-agent have recourse directly against the employer of the agent: for the good reason that that employer is not in such case an undisclosed principal within the scope of the doctrine of undisclosed principals. So in *Schmaling v. Thomlinson*,⁵⁹ where the defendant employed X to transport cocoa to Amsterdam and X employed the plaintiff to perform the whole transport, the plaintiff was not allowed to recover from the defendant the sum due for the transport although, as it appears, the defendant had not yet paid the sum to X; and in *Stephens v. Badcock*,⁶⁰ when the plaintiff employed X to collect money due to the plaintiff, and X employed the defendant, the plaintiff was not allowed to sue the defendant for the money although the defendant had collected it and had not paid it over to X who had absconded.⁶¹

(iv) It is obvious that where the original employer cannot intervene or be sued there is no question of set-off or of undisclosed principal. These cases, therefore, however instructive of the circumstances in which the relation of undisclosed principal to third party can come into *existence*, tell us nothing of the *nature* of that relation when it has been brought into being. But there is in these cases a good deal said about 'privity of contract' supposed to exist between the undisclosed principal and the third party; and such remarks will have to be considered when we come to deal with the theory of the doctrine.

(v) But the agent has sometimes (as noticed in (ii) above) authority to establish a 'direct' relation between employer and

⁵⁸ [1901] A. C. 240 (*supra*).

⁵⁹ (1815) 6 Taunt. 147; and see *Cull v. Backhouse* there cited at p. 148.

⁶⁰ (1832) 3 B. & Ad. 354.

⁶¹ Among other cases where direct suit was not allowed see *Cartwright v. Hateley* (1791) 1 Ves. Jun. 292; *Bramah v. Abingdon*, cited 15 East, at p. 66; *Cockran v. Irlam* (1813) 2 M. & S. 301 (a confused case); *Solly v. Rathbone* (1814) 2 M. & S. 298; *Mason v. Clifton* (1863) 3 F. & F. 899; and *Watson's Case* (1881) 7 Q. B. D. 374, *supra*.

sub-agent.⁶² We must now note the effect of this. If he exercises that authority without revealing the existence of the principal, and the principal, subsequently disclosed, is allowed to sue the sub-agent directly, can the sub-agent set off against the principal everything that he might have set off against the agent? On principle, a principle firmly established in *Montagu v. Forwood*,⁶³ yes. In that case the principal employed an agent to collect a loss payable by Lloyds; the agent employed a sub-agent who believed the loss to be payable to the agent on his own account; the sub-agent collected the loss and, before he had paid it over, the agent failed while indebted to the sub-agent on a general account. The principal claimed the money from the sub-agent; the sub-agent was allowed to set off the whole indebtedness of the agent. It was said⁶⁴ by Bowen L.J.:

‘The principle is not confined to the sale of goods. If A employs B as his agent to make any contract for him . . . and B makes a contract with C or employs C as his agent, if B is a person who would reasonably be supposed to be acting as a principal and is not known or suspected by C to be acting as an agent for anyone, A cannot make a demand against C without the latter being entitled to stand in the same position as if B had in fact been a principal.’⁶⁵

(vi) The case of *Kaltenbach v. Lewis*⁶⁶ however raises a difficulty. There the plaintiff consigned goods to Meyer, his factor in London. Meyer employed the defendant as a broker. The defendant believed Meyer to be the owner. Meyer was indebted to the defendant. Meyer deposited the documents of title with the defendant and instructed him to sell the goods. On this deposit a further £2,000 was advanced by the defendant to Meyer. The defendant on Meyer’s instructions contracted to sell the goods, the price to be paid by the purchaser to the defendant in six months’ time. After that contract, but before payment by the purchaser, Meyer failed and the plaintiff disclosed himself to the defendant. The plaintiff claimed the proceeds of sale of the goods allowing only the £2,000 (which had been made as a present advance upon the documents of title) to be set off by the defendant. The defendant claimed to set off

⁶² As he had in *De Bussche v. Alt* (1878) 8 Ch. D. 286, 310—311 (*supra*).

⁶³ [1893] 2 Q. B. 350. For the purpose of stating the case shortly Montagu is taken to be the principal. There was in fact a principal behind Montagu; but that in no way affects the decision.

⁶⁴ At pp. 355—6.

⁶⁵ See *Westwood v. Bell* (1815) 4 Camp. 349 and cases there cited.

⁶⁶ (1885) 10 App. Cas. 617: so far as the goods *ex* Beaconsfield only are concerned.

the whole indebtedness of Meyer. It was expressly stated by Lord Bramwell⁶⁷ that 'Meyer had authority to establish the relation of principal and agent between the plaintiffs and the defendants.' Nevertheless the House of Lords, reversing the Court of Appeal, decided that the defendant might set off only the £2,000 and not the whole indebtedness of Meyer.

The point of distinction, however unsatisfactory it may appear, between *Montagu v. Forwood*⁶⁸ and *Kaltenbach's Case*⁶⁹ would seem, from Lord Watson's judgment,⁷⁰ to lie in this: that in *Kaltenbach's Case*⁶⁹ although the defendant had (through the authority with which, as the Court found, the plaintiff had invested Meyer) a *right to receive* the purchase-money, he had *not actually received* that money before notice of the plaintiff, whereas in *Montagu v. Forwood*⁶⁸ the defendant (in spite of what appears from the reporter's narrative preceding the judgments) is treated by the Court as having *actually received* the money before notice of the plaintiff; and it would seem that the critical moment for determining whether a right of set-off has *accrued* in favour of the defendant against the undisclosed principal (within the rule in *George v. Clagett*⁷¹) is the moment of the *actual receipt*. So that in *Montagu v. Forwood*⁶⁸ a right of set-off had, and in *Kaltenbach's Case*⁶⁹ it had not, accrued to the defendant before notice of the plaintiff.

It should also be noticed that before *New Zealand and Australian Land Co. v. Watson*⁷² there does not seem to have been any discussion of the question whether a factor had, beyond his authority *as factor*, an authority *as agent* to establish a 'direct' relation between the undisclosed principal and the broker employed by the factor (*i.e.* the sub-agent); and if the factor exceeded his authority as factor—*e.g.* pledged the goods for an antecedent debt owed by himself—the broker sub-agent could not claim any set-off against the principal.⁷³ But it would now appear that the question whether the factor has this larger authority—namely, authority to establish a 'direct relation' between the principal and the broker sub-agent—is pertinent; and if the factor has such larger authority it may be concluded from *Montagu v. Forwood*⁶⁸ that the broker sub-agent can set off against the principal the antecedent debt of

⁶⁷ At p. 636.

⁶⁸ [1893] 2 Q. B. 350.

⁶⁹ (1885) 10 App. Cas. 617.

⁷⁰ At p. 627. Lord Bramwell's judgment, however, even upon this view, raises notable difficulties.

⁷¹ (1797) 7 T. R. 359 (*supra*).

⁷² (1881) 7 Q. B. D. 374 (*supra*).

⁷³ See, *e.g.* *Macnee v. Gorst* (1867) L. R. 4 Eq. 315 (*supra*).

the factor, at any rate if the set-off has actually accrued within the meaning above discussed.

However, in spite of the difficulties which these cases may raise, it is clear that the rule in *George v. Clagett* applies to actions by undisclosed principals against sub-agents: namely, that if the undisclosed principal can sue the sub-agent at all, the sub-agent can set off against him any set-off which has actually accrued in the sub-agent's favour against the agent.

C. Where the principal uses an agent to buy.

(i) Again we must be concerned with the question of authority. In this type of contract, normally the only authority given to the agent is the *express authority* given to him by the principal telling him 'Buy for me, in your own name if you like, not more than X tons of hay at not more than Y shillings per ton.' The principal does not normally do any external notorious act from which any authority other than the express authority may be implied.

(ii) This type therefore differs fundamentally from the type where the principal consigns goods to the agent for sale. The consignment of goods for sale is an act from which even the common law implied a general authority to sell. So long therefore as the factor kept himself within that general authority, *i.e.* was selling, the principal was allowed to intervene even if the agent in the actual sale was acting in excess of his express authority. But once the agent acted outside that general authority, *e.g.* pledged the goods, the pledgee was not allowed recourse against the undisclosed principal. By parity of reasoning, in the case of a principal using an agent to buy, there being then normally no authority except the express authority, if the agent acts outside the express authority, the vendor cannot have recourse against the 'principal,'⁷⁴ nor consequently the 'principal' against the vendor, for the good reason that the 'principal' is not then an undisclosed principal within the meaning of those words.

(iii) It is, of course, clear from *Durant's Case*⁷⁴ that the express authority to be efficacious must be previously given. An implied authority is necessarily previous, for it depends on an act which, by supposition, is previous.

(iv) But, exceptionally, a principal even when constituting an agent to buy may do an external notorious act: for example he may put him in charge of a beer-house. From that act, an

⁷⁴ *Keighley Mazsted & Co. v. Durant* [1901] A. C. 240 (*supra*).

authority may be, and sometimes is, implied even in an agent to buy. In such case, so long as the agent keeps within that implied authority, the principal can sue or be sued, even if the agent acted in excess of the express authority (by supposition smaller than the implied authority). So in *Watteau v. Fenwick*⁷⁵ where the principal put his agent in charge of an hotel and the agent, in excess of his express instructions, ordered goods suitable to be supplied to a person in charge of an hotel, it was held that the person supplying could sue the principal for the price; for the agent was taken as having, in spite of his instructions, a general authority to buy that class of goods as much as a factor had even at common law a general authority to sell. The distinction between *Watteau v. Fenwick*⁷⁵ and *Durant's Case*⁷⁶ is that in one case there was, in the other there was not, an external notorious act from which general authority of a defined class could be implied.

(v) Certainly there is nothing improper or unreasonable decided in *Watteau v. Fenwick*⁷⁵ which was followed in *Kinahan & Co., Ltd. v. Parry*.⁷⁷ The pity is that this kind of authority is not more frequently and more largely implied. There is, in *Watteau v. Fenwick*⁷⁵ an excellent example of a pure estoppel by conduct, a thing generically approved of by English law but of which comparatively few specific examples are to be found in the books.

(vi) In this type of case, there is no question of set-off by the third party; for money is here owed to that third party. There may be a question whether the principal can set off against the third party the antecedent debt of the agent to the principal. But clearly he cannot. As the third party cannot set off against the principal rights accruing against the agent after notice of the principal, so the principal cannot in this type set off at all against the third party, because he knows that a third party will come into existence before any rights can possibly have accrued to him against the agent as such. The state of accounts between principal and agent does not affect the vendor to the agent. That was long ago decided by Lord Ellenborough, who said⁷⁸:

‘A person selling goods is not confined to the credit of the broker⁷⁹ but may resort to the principal on whose account they are bought; and he is no more affected by the

⁷⁵ [1893] 1 Q. B. 346.

⁷⁶ [1901] A. C. 240.

⁷⁷ [1910] 2 K. B. 389; but see appeal in [1911] 1 K. B. 459.

⁷⁸ In *Kymer v. Suwercropp* (1807) 1 Camp. 109; see also *Waring v. Favenck*, *ibid.* 85.

⁷⁹ In this case the broker bought in his own name and apparently as principal.

state of accounts between the two than I should be, were I to deliver goods to a man's servant pursuant to his order by the consideration of whether the servant was indebted to the master or the master to the servant.'

(vii) By a parity of reasoning, payment by the principal to the agent was held not to be such payment to the third party as would discharge the principal. In *Heald v. Kenworthy*⁸⁰ the defendants, the undisclosed principals, used X as their agent to buy. The plaintiffs who, until disclosure, treated X as the principal, sold goods to X. The goods were delivered and the defendants paid X. Before X paid the plaintiffs, he failed. The plaintiffs now sue the discovered defendants for the price. It was held that the defendants were liable anew to the plaintiffs for that price, Parke B. saying⁸¹:

'If a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt, and the giving the agent money for that purpose does not amount to payment unless the agent pays it accordingly.'

But Lord Ellenborough in *Kymer v. Suwercropp*⁸²—which incidentally is good authority for the statement that even payment by the principal to the agent is not discharge of the principal—had gone on to suggest, *obiter*, that in some cases there might be an estoppel against the third party such as to prevent him suing the principal after payment.⁸³ Relying on this *dictum* and upon other *obiter dicta* by Lord Tenterden in *Thomson v. Davenport*⁸⁴ the Court in *Armstrong v. Stokes*⁸⁵ decided, in direct opposition to *Heald v. Kenworthy*,⁸⁶ that the plaintiff, the third party, who had sold goods to X believing him to be the principal could not recover the price from X's undisclosed principals, the defendants, upon the failure of X after the price had been once paid to X by the defendants, even though the plaintiff had admittedly not been guilty of any laches.

The decision in *Armstrong v. Stokes*⁸⁵ was, however, in its turn subjected to severe criticism in *Irvine v. Watson*⁸⁷ though this latter case dealt, on its facts, with an unnamed and not an undisclosed principal. Right was there expressly⁸⁸ reserved to

⁸⁰ (1855) 10 Exch. 739.

⁸¹ At p. 745.

⁸² (1807) 1 Camp. 109; see also *Waring v. Favenck*, *ibid.* 85.

⁸³ There may be an estoppel by judgment before disclosure of the principal: *per* Lord Cairns in *Hamilton v. Kendall* (1879) 4 App. Cas. 504, 514.

⁸⁴ (1829) 9 B. & C. 78.

⁸⁵ (1872) L. R. 7 Q. B. 598.

⁸⁶ (1855) 10 Exch. 739.

⁸⁷ (1880) 5 Q. B. D. 414

⁸⁸ At p. 421.

reconsider *Armstrong v. Stokes*^{88a} and the decision there was limited⁸⁹ to meaning this:

‘That when the seller deals with the agent as the sole principal and the nature of the agent’s business is such that the buyer ought to believe that the seller has so dealt, in such a case it would be unjust to allow the seller to recover from the principal after he paid the agent.’

The estoppel against the third party seller is therefore left much at large; and where estoppels by conduct are by the common law left at large it is exceedingly difficult to bring them into play in any particular set of circumstances. The better opinion, therefore, which is taken by Professor Gutteridge in *Smith’s Mercantile Law*,⁹⁰ is that the decision in *Armstrong v. Stokes*,⁹¹ if sound at all, should be confined to repetitions of the rather odd facts in *Armstrong v. Stokes*⁹¹; and by consequence it is suggested that normally, if not always, there is a duty in principals to see third party vendors *actually* paid.

(9) As a result of the cases dealing with particular instances of undisclosed principals, we may make these further general propositions, closely connected with (3) and (6) above, namely:

(i) A question of undisclosed principal properly speaking arises only in cases in which the agent was acting within his authority: it being understood that his authority is not necessarily always limited to the express authority given to him by the principal; but that, if there is an external notorious act, it is the authority, larger than the express authority, which the law may imply.

(ii) Where any person claims as undisclosed principal a right of action, he can always be met by any defence which was actually available against the agent before notice of the principal.

And now we may go on to examine the meaning of personality.

PERSONALITY IN CONTRACT.

Whatever the nature of the particular contract may be, a contract between A and B in their own names is by definition an obligation of A to B, and of B to A. The existence of an individual obliged to B is essential to any contract in the sense

^{88a} (1872) L. R. 7 Q. B. 598.

⁸⁹ At pp. 420—421.

⁹⁰ 13th ed. at p. 180.

⁹¹ (1872) L. R. 7 Q. B. 598.

that there must be an individual to support the *vinculum iuris* between himself and B.

The identification of an individual as *the A*, as the supporter of *this vinculum iuris*, is always material in any contract: so that even in a transaction admittedly 'impersonal'—the sale of goods—mistake amounting to a mistake of identification prevents the formation of a contract. No doubt there is a difficult question whether in a particular case mistake of *a* supposed characteristic amounts to a mistake of identification; but it is clear that when an individual contracts in his own name he unmistakably identifies himself, the individual, as *the A* making *this* contract.

There is a question, in any contract, whether there has been an identification of an individual as the contracting party; there is no question in any contract whether the identity of an individual established as the contracting party is material or immaterial. Either there is a contract in *this* case, namely a contract with *this* individual; or there is in *this* case no contract at all. There can never be a contract without an identified individual contracting with B.

No doubt the individual may be identified in any way to which B is willing to agree. Where there is an unnamed (but not undisclosed) principal, B in fact agrees to contract with that individual 'who shall be identified by the agent and shall accept or be bound to accept the agent's identification.' But again there is no doubt that when A contracts in his own name he unmistakably identifies himself, the individual A, as the party making that contract, and that B agrees to that identification.

(i) It appears therefore that every contract is always personal in the sense that a *persona* must be identified as the contracting party and that the identification necessary to constitute a *persona* amounts to the identification of an *individual*.

Further, whatever the nature of the contract may be, B is at liberty unless he comes into a very specialized class, with whom we are not here concerned, *e.g.* if B is an innkeeper, to refuse to make it with any particular person or any class of persons. B is at liberty, if he wishes, to refuse to sell toys to red-haired men however solvent. And simply by contracting with A as A, he does not waive his liberty to refuse to contract with C.

C cannot by any agreement with A only and without the consent of B so substitute himself into any contract between A and B as to make himself the individual contracting with B, nor

can any act of A's divest A of his own individual liability to B on that contract.⁹²

(ii) Therefore in a second sense every contract is always personal in so far as no individual C can fill the rôle of any other individual, A, as the contracting party in any contract made by A; and in every contract made by A with B, there is a continuing obligation between A, as A, and B.

But the rigid English theory of contract went much further and maintained that, where there was no negotiable instrument, the *rights* arising from the clearly personal obligation between A and B as identified individuals must remain confined to A and B, in the sense that neither A nor B could assign his rights to C so as to enable C to sue on that contract. C could not sue on that contract even if he was the party expressly intended to be benefited: so long as the contract remained a contract simply and did not also create a trust.

This last rule clearly does not go to the foundations of the idea of contract; and it has been whittled away to a large extent: so that there exists to-day a numerous class of contracts, admittedly personal in the first two senses, of which the rights can be assigned so as to enable C to sue at law or in equity. Contracts therefore can now be divided into 'contracts of which the rights can be assigned' and 'contracts of which the rights cannot be assigned.' By a perfectly proper use of the word (so long as its meaning is understood) the latter are called personal the former impersonal.

(iii) Therefore in a third sense of personal, some contracts—in fact a restricted class—are personal in that the right (or benefit) accruing under them may not be assigned.

Further, though neither A nor B can by any unilateral act divest themselves of their mutual obligations under the contract, in some cases either party may discharge vicariously a liability which is admitted to be his. So, normally, a contract to deliver goods is a contract to cause goods to be delivered and does not usually entail a duty on A himself to carry the goods to B's doorstep. But a duty may by contract be created in A to perform the burden with his own hand—*e.g.* by a contract to paint the portrait of B. Again, by a perfectly proper use of the word, this latter is called a personal contract, the former impersonal.

(iv) Therefore in the fourth sense of personal a contract is

⁹² Unless A has in his contract with B acquired against B either expressly or by statute or by law merchant a right at his own wish to substitute another's liability for his own, or unless the privity between A and B is simply a privity of estate.

personal if the burden created by it cannot be performed vicariously.⁹³

There may be a further sense in which a contract is personal if the *quantum* of the subject-matter of the contract is determinable only by the actual requirements from time to time of the named contracting party; but this sense may without difficulty be included in the third sense above.

As a result of this examination of personality we may make the following general proposition touching undisclosed principals.

(10) (a) So far as personality in the first and second senses is concerned, being a common characteristic of all contracts, it cannot by itself be a bar in any particular contract to the intervention of the undisclosed principal, if undisclosed principals are to be allowed at all. Further it will be found that the proper theory of undisclosed principals does not offend against the principles of personality in those senses. Williston well remarks⁹⁴:

‘It is sometimes said that the personal liability of the agent when relied upon by the other party makes the contract so personal as to make the doctrine of undisclosed principal inapplicable; but there seems some misapprehension here. If the apparent principal in the transaction is the agent, and the contract is executory on his part, he will be liable whatever the nature of the contract in other respects may be. Another person’s liability upon an executory promise can never be substituted without the promisee’s consent for that which was agreed upon. But it is a part of the doctrine of undisclosed principal that the agent always remains liable . . .’

(b) Personality in the third and fourth senses when present, will prevent the undisclosed principal from intervening; for the principal intervenes to assume the benefit or to perform the burden of the contract; and such intervention would in these cases be a breach of the very contract on which he seeks to intervene.

But in contracting, the agent may make a statement as to the persons interested in or to be benefited by the contract then to be formed; and such a statement may be a material representation.

⁹³ It is admittedly difficult to determine whether a *particular* contract is personal in the third and fourth senses above—for a recent discussion see *Graves v. Cohen* (1930) 46 T. L. R. 121, but the categories of personality into which particular contracts may fall are clearly established.

⁹⁴ Williston, *Contracts* (1920 ed.) § 286, at p. 551.

So where A expressly asked the agent B 'Are you dealing for C?' and the agent answered 'No,' when in fact he was, C could not have intervened as undisclosed principal on that contract, for the good reason that there was no enforceable contract on which he could intervene. The contract had been procured by an express misrepresentation—indeed a fraudulent misrepresentation: B, as it was concisely put, 'told a lie.'⁹⁵

Where the misrepresentation is *express* there is no difficulty: neither the agent nor the principal can enforce the contract against A; for it is a contract voidable at the option of A. But can the representation be *implied*? Normally it must not be supposed that there is, in any contract of which the benefit is assignable, any representation as to the person interested or to be benefited, and mere non-disclosure of that person, if he is other than the contracting party, is not a misrepresentation even if it is known that A is strongly disinclined to benefit that person.⁹⁶ But a contract of which the benefit is normally assignable—*e.g.* a lease—may in highly peculiar circumstances contain an implied term that the benefit shall not be assigned.⁹⁷ Similarly where B, acting as agent for the undisclosed C, contracts with A, B may in highly peculiar circumstances without express representation represent impliedly not only that he, B, obliges himself as B to A—he always represents that—but also that no other individual C has any interest in that contract against A. Such an implied representation (which may amount to a term) is one of the grounds taken by the Court in *Humble v. Hunter*.⁹⁸

If such a representation is made impliedly, the undisclosed principal clearly cannot intervene: for his intervention would contradict the contract on which he seeks to rely. But there does not seem to be here a special class of 'personal' and 'impersonal' contracts: there is only a special and highly restricted class of circumstances in which a term is implied in any contract. A contract does not cease to be personal in the two senses first above defined simply because such a term is not implied.

However, a statement in Pothier's *Traité des Obligations*,

⁹⁵ *Archer v. Stone* (1898) 78 L. T. 34; where note that the agent B was suing.

⁹⁶ *Nash v. Dix* (1898) 78 L. T. 445; *Dyster v. Randall* [1926] Ch. 932.

⁹⁷ See Lord Eldon's remarks in *Bonnett v. Sadler* (1808) 14 Ves. 526, at p. 528.

⁹⁸ (1848) 12 Q. B. 310: see above, p. 327. But as regards charterparties, it now seems that such terms will not be implied: see *Fratelli Sorrentino v. Buerger* [1915] 1 K. B. 307.

§ 19,⁹⁹ together with Fry, Specific Performance, § 229, and the case of *Smith v. Wheatcroft*,¹ seem to have started a confusion.

The statement in Pothier, as cited, is as follows:—

‘Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand.’

This statement of Pothier's is sufficient to demonstrate the danger of importing into our own law propositions expounded by jurists learned in other systems. The statement is untrue in English law, for it cannot be made to tally with the decision in *Phillips v. Brooks*.² The distinction proposed is also highly unreal and involves an inquisition into the possible ‘feelings’ of the contracting party at the moment of contract. Further, the statement has no special application to contracts involving undisclosed principals; for there the person contracting is the agent and as to him there is, by supposition, no error.

Fry, though basing himself on Pothier, makes the statement accord much more reasonably with the principles of the English law of contract. In § 229 of his treatise on Specific Performance he says:

‘The law seems now to be that where one person is deceived as to the real party with whom he is contracting and that deception either induces the contract or renders its terms more beneficial to the deceiving party or more onerous to the deceived or where it occasions any other loss or inconvenience to the deceived party, there the contract cannot be enforced against him; but that where none of these circumstances can be shown to follow from the deception, the contract may be enforced.’

This proposition is unexceptionable provided it is realized that the party contracting in his own name always identifies

⁹⁹ Cited in *Smith v. Wheatcroft* (1878) 9 Ch. D. 223, 230; *Gordon v. Street* [1899] 2 Q. B. 641, 647.

¹ (1878) 9 Ch. D. 223.

² [1919] 2 K. B. 243.

himself as the contracting party, and that this identification is never a deception of the other party; and that normally a person contracting in his own name does not, by that mere fact, make any representation that he is not contracting as trustee for, or for the benefit of, another.^{99a} However, the adjective 'real' in the phrase 'as to the real person with whom he is contracting' is most misleading. For from it the opinion might incautiously be deduced that Fry supposed that when A in his own name contracts with B, B may 'really'—whatever that may mean—be contracting with C.

In *Smith v. Wheatcroft*¹ Fry J. had to decide whether at the suit of the undisclosed principal and the agent, he would give specific performance of a contract for the sale of land belonging to the defendant made with the defendant by the agent in his own name. He did give specific performance; but by the form of question he there asks it might appear that he would not have given specific performance if the defendant had proved that he was unwilling to enter into a contract in the same terms with anybody other than the agent acting for his own benefit.

With respect, it is submitted that what the defendant might or might not have been willing to do in other situations is totally immaterial provided that in this situation he, without misrepresentation, entered into a binding contract with an identified person, X the agent, and that the benefit of that contract was not unassignable because of either the nature of the contract or any express or implied term in the contract. To the validity of that contract it is immaterial that the defendant would not be willing to undertake another contract, namely, a different contract with a different party, *i.e.* with the undisclosed principal. Fry J. does not specifically ask or answer the questions 'With whom did the defendant in this instance contract to sell this land?' nor 'Was this contract tainted with any material misrepresentation made by the contracting party to the defendant?' nor 'Was it a term, express or implied, of this contract that the agent should contract for his own benefit only?'

But McCardie J. in *Said v. Butt*³ seems to take this case of *Smith v. Wheatcroft*⁴ together with Fry, Specific Performance, § 229, and Pothier, § 19 above quoted,⁵ and a list of cases to be

^{99a} See note 96.

¹ (1878) 9 Ch. D. 223.

³ [1920] 3 K. B. 497; and see *infra*, p. 349.

⁴ (1878) 9 Ch. D. 223.

⁵ *Supra*, p. 343.

cited below ⁶ as establishing the proposition that there is a class of contract 'impersonal' in the sense that it is not a bond between two individuals and that it is only in this class of 'impersonal' contract that undisclosed principals are allowed to intervene.

The meaning of 'impersonal' is here entirely mystic. *Boulton v. Jones* ⁷ and *Gordon v. Street*,⁸ both quoted by McCardie J., establish that (a) a contract to sell goods, (b) a contract to lend money, are both personal in the sense that it is essential that the individual who appears as the contracting party should be that individual who names or describes himself or is named and described by the other. But it is clear that in a contract to sell goods an undisclosed principal may intervene. An undisclosed principal therefore may intervene in a contract which is personal according to McCardie J.'s sense (whatever that sense may be). Again, if a contract to sell goods is not impersonal (since it is essential in that type of contract to have an identified buyer ⁹ and seller ¹⁰), what contract is in this sense impersonal? Further, to suppose such impersonal contracts seems to come very close to supposing that there may exist a bond between two individuals when one of the two is non-existent.

It is submitted that there is no such type of impersonal contracts and that by consequence the distinction of contracts into contracts personal and contracts impersonal in this pretended meaning is no distinction and can have no bearing on the problem of undisclosed principals. But it is allowed that in any contract there may be a representation or a term express or implied, that no person other than the contracting party is interested in that contract, though such representations or terms will be implied only in highly peculiar circumstances. If they are implied, the undisclosed principal, as we have seen, may not intervene.

THEORY OF THE DOCTRINE OF UNDISCLOSED PRINCIPALS.

We may sum up the result of the last section as follows: 'Where a contract has without misrepresentation been obtained in his own name by an authorized agent, being a contract of which the benefit may be assigned and the burden performed vicariously and not containing expressly or, in highly peculiar circumstances, impliedly a term excluding undisclosed prin-

⁶ *Infra*, p. 350.

⁷ (1857) 2 H. & N. 564.

⁸ [1899] 2 Q. B. 641.

⁹ *Cundy v. Lindsay* (1878) 3 App. Cas. 459.

¹⁰ *Boulton v. Jones* (1857) 2 H. & N. 564.

cipals, there (so far as the condition of personality is concerned) the agent's undisclosed principal may intervene on that contract to take the benefit or be fixed with the burden, even though the agent has necessarily been identified as the contracting party and even if the third party relies on the agent's liability or is known to have been unwilling to benefit the person who in fact is the undisclosed principal: it being clear that the mere fact that the agent contracts in his own name does not normally amount to a representation ^{10a} that he is not acting as trustee for or for the benefit of another.'

So far we have, without examination, used the traditional words 'the undisclosed principal may intervene on the contract.' We have now to examine whether that phrase is a proper phrase. It is submitted that the phrase not only is proper, but is the only phrase strictly correct.

That phrase implies, and we have continuously supposed, that there is a contract, in every sense of the word, between the agent and the third party, and that it is upon this contract, and upon this contract only, that the principal 'intervenes'—*i.e.* comes in as somebody other than the contracting party. We have shown that there is nothing in the facts dealing with undisclosed principals to contradict that theory and have given in (5) and (7) above evidence that it is the true theory.

It is admitted that undisclosed principals are an anomaly. It is, according to the old rigid English law of contract, anomalous that any person other than the contracting party should be able to sue on a contract. Undisclosed principals are anomalous in the sense that assignees with power to sue are anomalous. It is submitted that they are not anomalous in any other sense. Their presence does not contradict the fundamental principles of contract; it limits only the rule that no person but the contracting party may sue or be sued on the contract.

This proposition is disputed and denied; and it is objected that the contract on which the undisclosed principal sues is 'really,' or 'in effect' or 'in law' a contract between himself and the third party. In so far as these words mean only that by anomaly the principal may sue or be sued they are true, but are not an objection to the statement that the contract sued upon is a contract between the third party and the agent. In so far as they may be taken to contradict that statement, they are wrong.

It is admitted that the term 'privity of contract between

^{10a} See note 96.

principal and third party' is frequently used, especially in the early cases. It is admitted also that when asked why undisclosed principals should be allowed to sue, the judges have frequently *currente lingua*¹¹ answered 'because they have privity of contract.' But it is suggested that in the first case the whole meaning of 'privity of contract' is, and only is, 'right to sue or liability to be sued'; and that in the second case the reason assigned is merely a superfluous answer to a superfluous question. Indeed, it would appear an absurdity in the same breath to admit that a thing is an anomaly and to assign a reason for it which at once makes it the most regular proceeding. And, *contra*, it is always said that the principal is 'intervening.' If the principal is the contracting party, how can he be said to be intervening in a contract which is declared to be 'really' his own?

It is suggested that the theory that the contract is a contract between the principal and the third party (i) is contrary to the express decision of several cases in which undisclosed principals were involved; (ii) is not taken as the *ratio decidendi* of any case in which there was an undisclosed principal except *Said v. Butt*¹² which we will discuss presently.

(i) The theory that the contract in which the undisclosed principal is involved is a contract between himself and the third party contradicts some well-decided cases.

(a) It is an axiom that in a transaction between A and B, if A knows that B will not (from any motive) contract with him but nevertheless attempts to steal B's consent to a contract, he cannot, having purported to steal B's consent, pretend that there is a contract between himself and B: on any view of contract, because neither is there consent, consent not being capable of being stolen, nor has A any 'reasonable expectation' that consent was given by B to that contract.

If therefore the contract is between the undisclosed principal and the third party, there can be no contract when the undisclosed principal knows that the third party refuses to contract with him. But there is a contract, enforceable even by specific performance, when the undisclosed principal, knowing that the third party refuses to contract with him, employs an agent acting in his own name to effect a contract with the third party. This contract therefore cannot be between the undisclosed principal and the third party. Of this chain of reasoning, the minor to be proved is proved by *Nash v. Dix*¹³ and *Dyster v.*

¹¹ See, e.g. *Durant's Case* [1901] A. C. 240.

¹² [1920] 3 K. B. 497; see below, p. 349.

¹³ (1898) 78 L. T. 445.

Randall,¹⁴ both being express decisions on facts expressly raising the question whether there was an enforceable contract when the principal knew that the third party defendant would not contract with him, the principal. Also in *Nelthorpe v. Holgate*,¹⁵ though this is no longer an express decision, it is said:

'If this right [of using an agent who contracts ostensibly on his own account] be exercised from a belief, well or ill founded, that, were the real relation between the agent and his principal known, the other party would from mere caprice or unreasonably or from a bad motive decline to contract or would use the knowledge for the purpose of extortion, that can make no difference.'

And even as early as 1781, Lord Thurlow said¹⁶:

'I should be very sorry to lay it down that a man treating with a third person in trust for a second whom he had refused to deal with could therefore set it aside.'

Of course, the undisclosed principal can intervene only if the contract between the agent and the third party is in fact, according to the known rules governing contracts between A and B in their own names and on their own account, a contract enforceable against the third party.

(b) It is an axiom that if there is a contract between A and B, and that contract has been procured through a material misrepresentation made by B to A, the contract can be rescinded, *rebus stantibus ut ante*, by A upon suit against B.

If therefore the contract were between the principal and the third party and had been procured through a material misrepresentation made by the third party to the principal, the contract could be rescinded, *rebus stantibus ut ante*, by the principal upon suit against the third party. But the principal cannot sue the third party to obtain rescission in such circumstances. Therefore the contract is not between the principal and the third party. Of this chain of reasoning, the minor to be proved is proved by the express decision of Russell L.J., as he then was, in his judgment on the principal case¹⁷: in which case there was no suggestion that the '*res*' were not '*ut ante*.' It may be inferred also, though not with such nice precision, from the case of *Hyslop v. Morel*.¹⁸

(c) Some other contradictions with decided cases which are

¹⁴ [1926] Ch. 932.

¹⁵ (1844) 1 Coll. C. C. 203, at p. 220.

¹⁶ *Irnham v. Child* (1781) 1 Bro. C. C. 92.

¹⁷ *Collins v. Associated Greyhound Racecourses, Ltd.*, [1930] 1 Ch. 1, at p. 37.

¹⁸ (1891) 7 T. L. R. 263.

involved in the theory that the undisclosed principal is the party contracting the contract with the third party may be gathered from a consideration of the general propositions (5) and (7) above, and the cases there cited.^{18b}

(ii) There remains to be considered the case of *Said v. Butt*.¹⁹ There (so far as we are concerned), Mr. Said, knowing that the Palace Theatre, Ltd., would not contract with him for a sale by it to him of a seat at the Palace Theatre on December 23, 1919, which was the night of a first performance, instructed Mr. Pollock to buy him such a seat. Pollock, in his own name, contracted with the Palace Theatre, Ltd., for such a seat. Question: Did Said, as undisclosed principal, have a right against the Palace Theatre, Ltd., to occupy that seat on that night?

The question might have been answered simply and summarily: 'No; this in the circumstances is a contract, similar to a contract to be a lodger in a private house or to be a member of a club, the benefit of which may be taken only by the contracting party, the benefit of which is unassignable. Said is not the contracting party. Said therefore has no right to sit in this seat on this night.'²⁰ But that was not the way in which it was answered by McCardie J.

The learned judge puts his argument as a syllogism:

The major,
p. 500.

'Before the plaintiff [as undisclosed principal] can succeed he must establish that there was a binding and subsisting contract between the Palace Theatre and himself.'

The minor,
p. 503.

'I hold that by the mere device of utilizing the name and services of Mr. Pollock the plaintiff could not constitute himself a contractor with the Palace Theatre against their knowledge and contrary to their express refusal.'

The conclusion
(p. 503, immediately
after the minor).

'He [Said, the plaintiff] is disabled from asserting that he was the undisclosed principal of Mr. Pollock.'

^{18b} The very vexed question—whether the third party can set off against the agent suing in his own name a debt owed to the third party by the undisclosed principal—seems to be further evidence that the contract is not between the undisclosed principal and the third party: see the cases cited in 2 Smith L. C. (13th ed.) pp. 137–139.

¹⁹ [1920] 3 K. B. 497.

²⁰ The question might perhaps, as summarily, have been answered as follows: 'No: in the circumstances, by his conduct, Pollock in this contract between himself and the Palace Theatre made a representation that he, Pollock, and he, Pollock, alone, had any interest in this contract.'

This syllogism also involves as a necessary corollary that there is a class of contracts between an identified A and an identified B in which C is allowed to say that the identified B is not the identified B but is C—a class of contracts, that is to say, impersonal in the sense that it is immaterial if any or what individual has been identified as the contracting party: otherwise, according to McCardie J.'s major, no undisclosed principal could ever succeed. This corollary has already been examined and has been found to be untrue.²¹

Touching the syllogism it is submitted that as a syllogism it is impeccable; it is also submitted that as a statement of the effect of the decided cases (i) the major is false, (ii) the minor is true, indeed is obvious, and also is irrelevant; (iii) the conclusion does not follow upon the establishment of the minor if the correct major is substituted for the incorrect.

The falsity of the major has already been examined.²² The correct major would be: 'Before the plaintiff can succeed he must establish that there was a binding and subsisting contract, obtained without misrepresentation, between the Palace Theatre and *Mr. Pollock*. He must also, *inter alia*, establish that the binding contract between *Mr. Pollock* and the Palace Theatre is a contract of which the benefit may be assigned and which does not contain any implied term excluding the plaintiff.'

In support, apparently, of the major and the corollary, McCardie J. cites the statement from Pothier, § 19, Fry, Specific Performance, § 229, and *Smith v. Wheatcroft* already considered above.^{22a} He also cites the following cases:—

1. *Boulton v. Jones*²³: in which it was decided that an offer to buy goods which is addressed to A cannot be accepted by B. No undisclosed principal was in fact involved in that case; and it is clear that that case can have no reference to undisclosed principals; for Bramwell B. says that the possibility of the existence of a set-off would prevent another person interposing himself in a contract, whereas it is quite clear that the actual existence of a set-off does not prevent the intervention of an undisclosed principal.

2. *Gordon v. Street*²⁴: in which A. L. Smith L.J. in delivering judgment is careful to remark²⁵ that 'to liken this case, as it has been [by counsel], to that of a person trading

²¹ *Supra*, pp. 344—345.

²² *Ibid.*

^{22a} *Supra*, p. 344.

²³ (1857) 2 H. & N. 564.

²⁴ [1899] 2 Q. B. 641.

²⁵ At p. 644.

under a firm's name or to that of an agent contracting in his own name for an undisclosed principal is to liken it to that with which it has no similitude'; in which case there was no undisclosed principal and where it was decided that Gordon could not enforce a contract which he had procured by a fraudulent misrepresentation that he was not Gordon.

3. *Archer v. Stone* ²⁶: in which the plaintiff, the agent, expressly made a fraudulent misrepresentation to the defendant – 'told a lie,' as North J. puts it—and in which it was decided that 'the man who tells the lie cannot enforce his contract.'

4. *Phillips v. Brooks* ²⁷: in which there was no question of an undisclosed principal, and in which it was decided that a person is sufficiently by sight and hearing identified as the contracting party.

5. *Hill v. Gray* ²⁸ and *Whurr v. Devenish* ²⁹: in which it was decided that the name, in the first case, of the owner of an 'old master,' in the second case of the owner of a horse, was a material representation in a contract for the sale of the old master and of the horse.

6. *Fellowes v. Gwydyr* ³⁰: in which it was decided by the Vice-Chancellor that the plaintiff who had expressly contracted as agent for and on behalf of a *named party* could himself sue on that contract for his own benefit, the named party disclaiming it. *Quaere* if this case is to-day good law.

7. *Nelthorpe v. Holgate* ³¹: an extract from which has already been quoted in support of our own contention,³² and in which it was decided that the agent and the undisclosed principal suing together could enforce a contract made by the agent in his own name with the defendant, although the principal and the agent knew or strongly suspected that the defendant would probably not contract on the same terms directly with the undisclosed principal.

No other case is cited on this point by McCardie J. None of these cases supports the proposition that the contract is a contract between the third party and the principal. None of the cases except by possibility *Fellowes v. Gwydyr* suggests that there might be a contract in which C could be allowed to argue that B, an identified person, is not B but is C—indeed *Boulton v. Jones* seems to be express authority, if any be

²⁶ (1898) 78 L. T. 34.

²⁷ [1919] 2 K. B. 243.

²⁸ (1816) 1 Star. 434.

²⁹ (1904) 20 T. L. R. 385.

³⁰ (1826) 1 Sim. 63.

³¹ (1844) 1 Coll. C. C. 203.

³² *Supra*, p. 348.

needed, that a contract must be between an A and a B, and that this B is not, and cannot be supposed to be, C. For these reasons it is suggested that, upon the proper theory, the contract on which an undisclosed principal intervenes, when he is allowed to intervene, is a contract strictly between the agent and the third party. That is the anomaly of undisclosed principals: that they may sue on a contract to which, strictly, they are strangers. It is an anomaly well known to English law; it is similar to the anomaly of allowing an assignee to sue.

The undisclosed principal seller was first allowed to receive money direct from the third party buyer, so as to avoid the injustice of having to claim in the bankruptcy of the agent-factor acting in his own name. Because he could receive direct, it was decided he could sue. Because he could sue, it was considered just that he should be liable to be sued. Because he could sue and be sued, it was said, in a phrase convenient if not taken as a statement more exact than it purports to be, that he had privity of contract. The statement was taken as an explanation; and on the statement taken as an explanation some no doubt incautious remarks were made. An attempt was then begun to treat those remarks as the considered declaration of a theory: *hinc illae lacrimae*. But it is perhaps not yet too late rationally to state the true theory.

The doctrine of the undisclosed principal is perhaps best considered as a primitive and highly restricted form of assignment, from which however much may be learnt about the probable development of the doctrine of assignment—still very imperfect.

COLLINS' CASE.³³

In *Collins' Case*, the facts so far as here material were simple. The defendant company proposed to issue some shares on the basis of a prospectus then drawn up. The issue was underwritten by the X company, the X company having a right to nominate sub-underwriters, who if approved by the defendant company should to that extent relieve the X company of its liability on the underwriting contract. The plaintiff Collins, having read and relying upon the prospectus, desired to sub-underwrite the issue. Upon his instructions and on his behalf but ostensibly as principals, Mason and Ovington applied to the X company to be sub-underwriters. The X company submitted the names of Mason and Ovington to the defendant company as sub-underwriters, and the defendant company approved and

³³ [1930] 1 Ch. 1.

accepted their names. The prospectus in fact contained a material innocent misrepresentation. On December 17, the issue having partially failed, Mason and Ovington were allotted their due proportion of shares by the defendant company.³⁴ Question: Can *Collins* as undisclosed principal intervene to claim rescission of the contract to take shares made between the defendant company and Mason and Ovington upon the ground that a material misrepresentation was made to him, Collins, the undisclosed principal, by the company in its prospectus?

The answer unhesitatingly given by all the judges (and, it is respectfully submitted, the proper answer) is: No.

The best and conclusive reason for that answer is given by Russell L.J., as he then was, in a very brief judgment:

‘In my opinion rescission of that contract between the company and Mason and Ovington could only be obtained at the suit of Mason and Ovington and upon proof of an allegation that Mason and Ovington had been misled by the prospectus.’³⁵

Lord Russell says nothing of the personality or impersonality of the contract: he makes the obvious and conclusive statement that rescission of a contract upon ground of misrepresentation may be had only by the contracting party misled by the misrepresentation, that the undisclosed principal, whatever may be his rights and liabilities in any contract, is not the contracting party, that the contracting party is the party acting in his own name and ostensibly for his own account.

The reasons given by the other learned judges are by no means so decisive. Luxmoore J. in the Court of first instance said³⁶:

‘The articles of association of the company contain the usual provision that the company shall be entitled to treat the registered holder of any shares as the absolute owner thereof. In addition to this, in accepting a particular application, the company is from the very nature of the

³⁴ Mason and Ovington endorsed the allotment letter to Collins, so that Collins, when entered upon the company's register on January 18, was in fact the first name to be entered therein in respect of the shares allotted to M. and O. But it was held that the endorsement operated as a transfer, that this transfer was not, so far as the company was concerned, made on the basis of the prospectus, and that therefore Collins could not claim to have the contract (if any) entered into on January 18 rescinded because of a misrepresentation in the prospectus. We are here concerned solely with the contract completed on December 17 and Collins' position as undisclosed principal in that contract.

³⁵ At p. 37. Whether Mason and Ovington could have proved their allegation by proving that Collins, their ‘mind’ in this matter, had been misled by the prospectus, *quaere*.

³⁶ At p. 19.

transaction entitled to consider the personality of the applicant before deciding to accept the application, and on both these grounds I think the application itself imports that it is made by Mason and Ovington as the real and only principals. I am therefore of opinion that the plaintiff would be unable to sue on the contract between the company and Mason and Ovington and *a fortiori* he would be unable to sue for rescission of such contract.'

It appears, therefore, according to Luxmoore J. that in a contract to take shares in a company adopting the usual articles of association, there is a representation by the applicant that though shares are certainly assignable he is in that application acting on his own account and not for an undisclosed principal, that this representation is a material term of that contract, and that therefore an undisclosed principal cannot intervene in that contract at all. The undisclosed principal cannot intervene in this contract for the reason that the agent has undertaken, as an implied term of his contract with the company, not only that he the agent is the unmistakable individual who obliges himself to the company—that is a term in every contract—but also that in this case no other individual has or will have any right in that contract, so far as the company is concerned, unless and until the agent transfers the shares according to the provisions of the articles of association. This is a logical reason provided that this somewhat surprising term can be implied.

Luxmoore J.'s second reason 'because the company is entitled to consider the personality of the applicant,' in so far as it is a second and different reason, seems to be adopted by Lord Hanworth M.R., who said ³⁷:

'In the present case it appears to me that the contract between the company and Mason and Ovington was one in which importance attached to the personality of the persons with whom the company were contracting. In such a case it is not right to treat the agents as necessarily interchangeable with their principal so as to enable the principal to come forward and seek to disaffirm the contract on the ground of a misrepresentation on which he alone had relied';

and by Lawrence L.J. who said ³⁸:

'A contract to become a member of a company is in my opinion one of that class of contracts in which an undisclosed principal cannot insist on taking the place of a party apparently contracting on his own account.'

³⁷ At p. 33.

³⁸ At p. 36.

It must not incautiously be taken that the learned judges intend to deny any of the following propositions:—

(i) In no contract, whether or not ‘importance attached to the personality of the ostensibly contracting party,’ can the undisclosed principal seek to disaffirm on the ground of a misrepresentation on which he alone relied.

(ii) In no contract can the undisclosed principal insist on taking the place of a party apparently contracting on his own account, if by that expression is meant ‘completely substituting himself for that contracting party’ or anything other than ‘intervening to take the benefit or to be fixed with the liability of the contract.’

(iii) In every contract the contractor is entitled to consider the personality of the other contracting party, in the sense that in contracting with A, he contracts with A as A.

(iv) In every contract, even when undisclosed principals are allowed to intervene, the ostensibly contracting party is and remains liable to the third party, so that the third party has and retains any benefit which might arise from the ‘importance attached to the personality of the ostensibly contracting party.’

The second reason then, so far as it differs from the first and so far as it may be good, seems to be simply an emphasis upon the fact that the Greyhound Co. had a right, as all third parties have, to retain the liability of Mason and Ovington, the ostensibly contracting party, and to insist that no other person's liability should be substituted for that liability of those persons, except, in the particular case of companies, by a transfer according to the articles of association. Consequently, if because of the existence or possible existence of a register or for any other ‘company’ reason, the intervention of the undisclosed principal would in any way prejudice the company in any recourse it might desire to have against Mason and Ovington, the principal, according to the doctrine long ago established in *O’Herlihy v. Hedges*,³⁹ cannot be allowed to intervene.

It is, of course, abundantly clear that a contract to take shares in a company is impersonal, in the sense that the benefit may be assigned. Indeed, shares in a company are examples of a contract in which the rights of assignment are, by statute, abnormally large.

Though the decision in *Collins’ Case* is undoubtedly correct, an incautious interpretation (which is easily come by) of some of the learned judges’ reasons for arriving at that decision may

³⁹ (1803) 1 Sch. & Lef. 123.

involve the interpreter in serious misconceptions touching the personality of contracts.

CONCLUSION.

It appears therefore that an undisclosed principal intervenes in a contract which is not 'really' or in any other sense his, but which is a contract between the third party and the agent and personal to them, in the sense that the agent has been unmistakably identified as the individual contracting the obligation with the third party, and that no other individual can assume the agent's individuality. The liability of the agent subsisting, the principal can intervene only to take the benefit or to be fixed with the liability of that contract and only if—

- i. There is a contract enforceable against the third party—
i.e. the agent has not procured *his* contract by any express or implied misrepresentation.
- ii. The principal has not been excluded by any express or, in highly peculiar circumstances, any implied term in that contract.
- iii. The contract is impersonal in the sense that the benefit may be assigned and the burden performed vicariously.
- iv. The agent acted within the express previous authority of the principal or within the authority implied by the general law from the principal's previous act.
- v. The principal's intervention does not prejudice the third party's right to have the agent's personal liability, if it is desired.
- vi. The principal allows to be used against himself every right against the agent actually accrued to the third party while the agent was by the third party reasonably believed to be the principal.

The undisclosed principal is an anomaly in the sense that he is allowed to sue or be sued although not a party to the contract on which suit is brought; he is not an anomaly in the sense that his intervention upsets the fundamental principles of contract.

Finally, consideration may be had of Lord Haldane's words ⁴⁰ upon this topic, and of the most illuminating sense behind them:

'If B contracts with C, *prima facie* there is a contract between these two only; but if at the time B entered into the contract he was really acting as agent for A, then evidence is generally admissible to show that A was the principal, and A can take advantage of the contract as if it had been actually made between himself and C. . . .'

⁴⁰ *Drughorn v. Rederi. Trans-Atlantic* [1919] A. C. 203, at p. 206.

LEASEHOLDS AND THE RULE IN *HOWE* v. *THE EARL OF DARTMOUTH*.

S. J. BAILEY.

THE decision in *Howe* v. *The Earl of Dartmouth*,¹ as developed and explained by subsequent cases, has long been recognized as authority for the rule that a residuary bequest of personalty to, or upon trust for, persons by way of succession,² casts upon the personal representatives or trustees two duties. Of these the first is that such of this personalty as is of a wasting or hazardous nature must be sold, and the proceeds invested in authorized investments; while the second compels them, for so long as the property remains unsold, to pay to the person who is beneficially entitled to the income for the time being, only so much of the actual income as would be payable had the sale and investment already occurred.³ In short, the wasting or hazardous part of the personalty is held upon an implied trust for sale, and the beneficiaries are to be treated from the outset as though the conversion has already taken place.

This rule is based upon a presumption, in equity, that a testator who makes such a residuary bequest desires the property to form a sound and continuing investment for each beneficiary in turn⁴; and, although the rule may be excluded by proof that it conflicts with the testator's apparent intentions, the presumption of equity is that the rule applies.⁵

As originally established the rule was as applicable to leaseholds⁶ as to other forms of personal property. The purpose

¹ (1802) 7 Ves. 137 a.

² A very common example is a bequest of 'all my personal estate to my trustees upon trust for my wife for life, and after her death upon trust for my children equally.'

³ Usually 4 per cent. per annum on the value of the personalty at the date of the testator's death: see *Re Beech* [1920] 1 Ch. 40. The balance of the rents and profits is then invested in authorized securities, and the income which the latter produce is paid out with the annual 4 per cent.

⁴ *Pickering v. Pickering* (1839) 4 My. & Cr. 289, per Lord Cottenham L.C. at p. 298; *Re Bates* [1907] 1 Ch. 22, per Kekewich J. at p. 26; *Re Wareham, Wareham v. Brewin* [1912] 2 Ch. 312 (C. A.), per Farwell L.J. at p. 317.

⁵ *Pickering v. Pickering* (supra) at p. 299; *Morgan v. Morgan* (1851) 14 Beav. 72, at pp. 82-3; *Blann v. Bell* (1852) 2 D. M. G. 775, at p. 779; *Macdonald v. Irvine* (1878) 8 Ch. D. 101, 124; *Re Bates* (supra) at p. 26; *Re Wareham* (supra) at p. 315.

⁶ *Craig v. Wheeler* (1860) 29 L. J. Ch. 374; *Re Game* [1897] 1 Ch. 881; also cases cited supra in footnotes (4) and (5) and post.

of this article is to examine the application of the rule to leaseholds at the present day.

The decision in *Re Brooker, Brooker v. Brooker* [1926] W. N. 93 is widely quoted as authority for the proposition that the rule no longer applies to leaseholds.⁷ Nevertheless, it is submitted that this is not a correct statement of the effect of that case or of the present law.

In the first place, the residuary bequest with which *Re Brooker* was concerned was of a kind to which the strict rule in *Howe v. The Earl of Dartmouth* has never applied.⁸ It was a disposition of residue (including leaseholds) upon an *express* trust for sale, and the question before the Court was whether the tenant for life under such *express* trust for sale was entitled to the whole of the income pending conversion. Before 1926 such a life-tenant was not so entitled; he could claim only so much of the income as would have been payable had conversion (and investment in authorized securities) already taken place.⁹ That is to say, a rule analogous to the second part of the *Howe v. Dartmouth* rule applied to such a case.¹⁰ At the present day, however, a tenant for life of land held upon trust for sale is entitled, by virtue of L. P. A. 1925, s. 28, sub-s. 2, to the whole of the net income of the land until it is sold.¹¹ Accordingly, it was decided in *Re Brooker* that (in view of the express trust for sale) the tenant for life was entitled to the whole of the income from the residuary leaseholds, despite the former rule. Lawrence J. (as he then was) appears, from the brief report of this case, to have stated as the reason for his decision that section 28, sub-section 2, excluded the rule in *Howe v. Earl Dartmouth*. But since, as shown above, that rule in its strict application was irrelevant to the case before him, presumably he must be taken to have had in mind only the second part of that rule—or rather the analogous rule which

⁷ Jarman on Wills (7th ed.) 1209; Lewin on Trusts (13th ed.) 278; Theobald on Wills (8th ed.) 625; Williams on Executors (12th ed.) 918—9; Wolstenholme & Cherry's Conveyancing Statutes (11th ed.) Vol. II, xviii.

⁸ Emmet, Notes on Perusing Title (11th ed.) 1015—6; Williams on Executors (12th ed.) 916 n.

⁹ Apparently this principle was first applied by Lord Eldon in *Gibson v. Bott* (1802) 7 Ves. 89. This case was decided three days earlier than *Howe v. Earl Dartmouth*, and was approved (*inter alia*) in *Caldecott v. Caldecott* (1842) 1 Y. & C. C. 312, at p. 324. The House of Lords dealt with such an express trust for sale in *Wentworth v. Wentworth* [1900] A. C. 163, and neither Judge nor counsel mentioned the decision in *Howe v. Dartmouth*. In *Brown v. Gellatly* (1867) L. R. 2 Ch. App. 751, there was no express trust for sale (the headnote notwithstanding) but a mere power to convert.

¹⁰ But the rules are quite distinct. See e.g. *Re Chaytor* [1905] 1 Ch. 233, per Warrington J. at p. 240.

¹¹ This is 'subject to any direction to the contrary in the disposition on trust for sale . . .': section 28, sub-section 2.

formerly applied when an express trust for sale was imposed upon a residuary bequest.¹²

Accordingly, since *Re Brooker* was not actually concerned with the rule in *Howe v. Earl Dartmouth*, it is now necessary to consider whether, independently of that decision, the rule has been affected by L. P. A. 1925, s. 28, sub-s. 2.

The section applies wherever land¹³ is held upon trust for sale.¹⁴ Clearly, therefore, it may apply even where such a trust for sale arises by implication—as occurs when the strict rule in *Howe v. Earl Dartmouth* applies. Consequently, even if one ignores the decision in *Re Brooker*, *prima facie* section 28, sub-section 2, has curtailed the rule in so far as it concerns leaseholds. If this be so, it follows that the tenant for life under a residuary bequest to which the rule applies can now claim the actual income from any leaseholds comprised therein, despite their wasting nature, until they are sold, and that he can no longer be compelled to accept the lower income which authorized investments would produce.

It is just possible, however, that section 28, sub-section 2, does not apply at all to cases where the rule in *Howe v. Earl Dartmouth* is concerned, for it operates 'subject to any direction to the contrary in the disposition on trust for sale.'¹⁵ It might be argued, therefore, that the established presumption (where the rule applies) of an intention to prevent the life-tenant from receiving the whole of the income, is a 'direction to the contrary' for this purpose.¹⁶ It is true that this presumption of intention cannot amount to more than an *implied* 'direction to the contrary'; yet it is arguable that such an implied direction is sufficient to exclude the sub-section. Some support for this argument is to be found in the fact that another section of the Act¹⁷ uses the phrase 'subject to any express direction to the contrary in the instrument,' and therefore appears to contemplate that, when the word 'express' is omitted, 'direction' is wide enough to include an *implied* direction. On the other hand it may be contended that, since section 28, sub-section 2, refers

¹² See note (9) *supra*.

¹³ The word 'land' includes land of any tenure—section 205, sub-section 1 (ix) L. P. A. 1925—and therefore covers leaseholds.

¹⁴ Section 28, sub-section 5.

¹⁵ The word 'disposition' here includes a testamentary gift: section 205, sub-section 1 (ii).

¹⁶ The word 'direction' is generally used in reported cases to denote the imposition of a duty (or trust) as opposed to a mere authority (or power) *e.g.* *Cary v. Cary* (1804) 2 Sch. & Lef. at pp. 188—9.

¹⁷ Section 25, sub-section 2.

only to directions 'in the disposition,' nothing less than an *express* direction can exclude it.¹⁸

Even if one were willing to assume that section 28, sub-section 2, operates upon the rule in *Howe v. Earl Dartmouth*, such an assumption by no means justifies the conclusion that this sub-section of the Act entirely excludes leaseholds from the ambit of the rule. Indeed, it is submitted that the rule is still competent to raise an implied trust for sale when a residuary bequest of leaseholds is made to or upon trust for persons by way of succession. In other words, it is contended that that part of the rule which creates a trust for sale may remain, even if that part of it which provides for a reduction of income pending the sale no longer applies to leaseholds.

Moreover, the very sub-section which is invoked by those who urge the contrary supports this contention, for section 28, sub-section 2, deals with land—of any tenure—only when that land is held upon trust for sale. Consequently, any statement that it affects the rule presupposes that the rule created, and still operates to create, a trust for sale.

Accordingly the net effect of section 28, sub-section 2, ✓ L. P. A. 1925, upon the rule in *Howe v. Earl Dartmouth* (if it affects the rule at all) is that where the rule effectively raises an implied trust for sale of leaseholds, and the trustees are exercising their power to postpone the sale,¹⁹ the tenant for life is entitled to the actual rents and profits therefrom so long as the leases remain unsold.

Nevertheless, although neither *Re Brooker* nor L. P. A. 1925, s. 28, sub-s. 2, appears to have succeeded in excluding leaseholds from the scope of the rule in *Howe v. Earl Dartmouth*, there is another section in the Act which requires consideration here. Section 25, sub-section 1, enacts that 'a power to postpone sale shall, in the case of every trust for sale of land, be implied unless a contrary intention appears'; and it might be argued that a power to postpone the sale indefinitely, coupled with the above-mentioned provision²⁰ that the life-tenant is entitled to the actual income until sale, may operate to defeat the purpose of the rule entirely. Thus, if the trustees for sale of a very short lease decide to postpone the sale of it, it may well happen that

¹⁸ But query whether this latter contention can stand. If so, it would apply equally to the words 'in the instrument,' as used by section 25, sub-section 2, *supra*. Yet there, as we have seen, the Legislature took care to use the word 'express,' thus suggesting that this word is necessary if directions implied in the instrument are to be excluded.

¹⁹ This power to postpone the sale is considered more fully in the succeeding paragraph.

²⁰ Section 28, sub-section 2, L. P. A. 1925.

the lease will end before the life-tenant dies, and the expectations of the remaindermen will be defeated. But even if this be true it can afford no grounds for holding that when such a trust for sale has been created it is therefore useless and to be ignored. Were this argument admissible it would apply equally to settlements of short leaseholds upon an express trust for sale, and would result in unthinkable confusion and uncertainty. Moreover, the sub-section does not apply when 'a contrary intention appears,' and it seems arguable that, since the rule in *Howe v. Earl Dartmouth* is based upon the presumed intentions of a testator to deal equitably with all the beneficiaries, a lengthy postponement of the sale is contrary to his apparent intentions, in that it enables the life-tenant to claim the whole income (under section 28) to the prejudice of the remaindermen.²¹

It is submitted, however, that, apart altogether from these latter considerations, it is abundantly clear that section 25 cannot negative the trust for sale which the rule creates; for, like section 28, sub-section 2, it does not apply at all unless and until a trust for sale has arisen. Accordingly, any argument that it affects the rule is an admission that the rule is still competent to create a trust for sale.²²

There is, however, another question to consider. Given that the above-mentioned provisions of the L. P. A. 1925, have no power in themselves to prevent the rule in *Howe v. Earl Dartmouth* from creating a trust for sale, or to destroy that trust for sale when it has arisen, have they nevertheless made the rule so purposeless that equity will cease to apply it to leaseholds? Will equity, in view of the unwelcome results which await such a trust for sale, refuse in future to imply one in these cases?

This line of inquiry assumes (what is not altogether certain) that section 25, sub-section 1, and section 28, sub-section 2, would apply to any trust for sale created by the rule, and that the testator's presumed intentions would not effectively exclude these sections. On this assumption one can see that a lengthy postponement of the sale might operate, in the case of a very short lease, to deprive remaindermen of the benefits which the testator presumably desired them to enjoy.

²¹ The fact that section 25, sub-section 2 protects trustees for sale, who are postponing sale, from incurring personal liability thereby does not appear to affect the matter. This protection is given only if and when they have a power to postpone; and it is available, apparently, only if they are acting in good faith: *Wolstenholme & Cherry's Conveyancing Statutes* (11th ed.) Vol. I, 178.

²² Since the power to postpone (under section 25) does not arise unless and until there is a trust for sale, it is in no way similar to cases where a residuary bequest which gives an express power to retain is therefore held to be outside the rule as showing that no implied trust for sale was intended by the testator: e.g. *Re Nicholson* [1909] 2 Ch. 111; *Gray v. Siggers* (1880) 15 Ch. D. 74.

Nevertheless it is doubtful whether the Court could, in reason, destroy the entire rule on these grounds. In the first place it must be remembered that the rule is based upon a presumption in equity that the testator intends a conversion into permanent securities, in order to ensure that the remainderman will benefit. Moreover, it is a rule fortified by many years of judicial recognition. If, therefore, the rule is to be altered, the alteration must be justified on the assumption that testators, while still intending to hold the scales evenly between successive beneficiaries, find that modern legislation forces them to seek new methods for achieving this intention. It can hardly be contended that a testator would cast aside his desires to deal equitably with his residuary legatees were he aware that an Act of Parliament now enables the tenant for life of land held on trust for sale to claim, so long as the property remains unsold, a larger proportion of the income than, in the circumstances, is just. Rather is it cogent reason for attributing to him a desire to accelerate the conversion of the property, whereby the scales will be held evenly for the beneficiaries at the earliest possible moment. And if it be that the enactment (section 25) sets at naught his desire for an immediate sale, presumably he will be forced to abandon any intention to create a trust for sale, and must seek his ends without one.

It appears, therefore, that if the Court declines to imply a trust for sale, holding that it is no longer effectual to achieve the testator's intentions, it must nevertheless preserve that part of the rule in *Howe v. Earl Dartmouth* which precludes the tenant for life from receiving the whole of the yearly income from the property. Otherwise an unjustifiable contravention of the maxim 'equity is equality' will result, and the equitable intentions which have been attributed to testators for so many years will be overridden.

The question now arises whether there is any existing authority which would, in these circumstances, preclude the Court from withholding part of the income from the tenant for life. In the first place it is clear that L. P. A. 1925, s. 28, sub-s. 2, does not now stand in the way, since that section applies only when there is a trust for sale. But it has often been decided, where testators authorized the retention of residuary personalty *in specie*, that such authorization may operate not only to exclude the executors' duty to sell, but also to show an intention to allow the life-tenant the whole of the annual income. Thus in *Brown v. Gellatly*, a power 'to invest . . . or allow to remain as at present invested, all my funds in'

certain securities, was held by the Court of Appeal to amount to 'the constitution by the testator of a larger class of authorized securities than this Court itself would have approved of. . . .' ²³ Accordingly, the tenant for life was held entitled to the whole of the income from these securities as it fell due. Yet in the same case it was held that certain ships, which formed another part of the residuary personalty, and as to which the testator had given the executors a power to realize coupled with power 'to sail my ships for the benefit of my estate until they can be satisfactorily sold,' were to be treated differently, and that 'a value must be set upon the ships' . . . and the tenant for life must have 4 per cent. on such value.' ²⁴ Apparently, therefore, even an express authority to retain property in specie does not preclude the Court from seeing, and enforcing, an intention that the life-tenant is to have only a fraction of the income. ✓ Accordingly it would seem that, if in future the Court decides against implying a trust for sale where leaseholds are concerned in a residuary bequest, it is yet at liberty to hold that the second part of the rule in *Howe v. Dartmouth* remains intact, and that the testator (though imposing no duty to sell) desires the life-tenant to have only so much income as authorized securities would produce.

The result of these considerations appears to be that, until a direct judicial decision is obtained on the matter, the modern application of the old rule in *Howe v. Earl Dartmouth* remains obscure as far as leaseholds are concerned. The most likely alternatives, it seems, are that either the Act increases the life-tenant's income, but retains the trust for sale, or that the Court will assume that the testator, wishing to evade the Act, no longer desires a trust for sale yet still requires the tenant for life to take only a part of the annual income of the leasehold property.

Nor is an inquiry into the present state of the *Howe v. Dartmouth* rule a matter of merely academic interest, for it raises the important question whether leaseholds comprised in a residuary bequest are settled land or land held upon trust for sale. If they are settled land, the tenant for life or statutory owner is entitled to insist that a vesting assent be made in his favour by the personal representatives.²⁵ But if the rule in

²³ (1867) L. R. 2 Ch. App. 751, *per* Lord Cairns L.J. at pp. 758—9.

²⁴ *Per* Lord Cairns L.J. at p. 758, following and approving *Meyer v. Simonsen* (1852), 5 De G. & Sm. 723. These two decisions were approved by the House of Lords in *Wentworth v. Wentworth* [1900] A. C. 163.

²⁵ S. L. A. 1925, s. 6. See also Second Schedule, paragraph 2 (1) to the same effect, where the testator died before 1926 and the land is still in the hands of personal representatives. If it be decided that the life-tenant of residuary lease-

Howe v. Dartmouth still raises a trust for sale he cannot do so, for it is clear that the rule contemplates an 'immediate' and 'binding' trust for sale within the meaning of L. P. A. 1925, s. 205, sub-s. 1 (xxix).²⁶

Finally it should be mentioned that some of the authorities appear to suggest that a lease which is sufficiently long may, by virtue of its length, be outside the *Howe v. Earl Dartmouth* rule²⁷—for the rule does not apply unless the property is of a 'wasting' or 'hazardous' nature. Nevertheless there seems to be no direct authority for this suggestion, for, even when the reports of cases specify the length of the leases concerned²⁸ (and many do not),²⁹ the judges rarely advert to the matter. In fact they appear to treat the length of a lease as immaterial, and to assume that since it is not a fee simple it is therefore wasting and impermanent and within the rule. Occasionally a judge comments upon the shortness of a lease in order to point out that it might well expire before the death of the first tenant for life,³⁰ but more often than not the rule is applied without any recorded observation by judge or counsel as to the length of the lease before the Court.³¹ However, there may yet be room for some doubt as to whether the rule would be held applicable to a very long lease.³²

holds is still entitled only to a proportion of the income, apparently he has not the powers of a tenant for life within S. L. A., s. 20, sub-s. 1 (viii) and the land must be vested in statutory owners: *Re Frewen* [1926] Ch. 580.

²⁶ The definition of 'trust for sale' given by L. P. A. 1925, s. 205, is adopted by the Settled Land Act, 1925, s. 117, sub-s. 1 (xxx), and is therefore applicable to S. L. A. 1925, s. 1, sub-s. 7, which enacts that there is no 'settlement' within the meaning of this Act when land is 'held upon trust for sale.'

²⁷ Jarman (*op. cit.*) at p. 1208, states that the rule formerly applied 'to short leaseholds,' and cites *Morgan v. Morgan* (1851) 14 Beav. 72, *Chambers v. Chambers* (1846) 15 Sim. 183, and *Lyons v. Harris* [1907] 1 Ir. R. 32. The edition of 1910 contains a similar statement in the present tense (at p. 1243).

²⁸ E.g. *Pickering v. Pickering* (1839) 4 My. & Cr. 289; *Chambers v. Chambers* (*supra*); *Lyons v. Harris* (*supra*); *Craig v. Wheeler* (1860) 29 L. J. Ch. 374; *Green v. Britten* (1872) 42 L. J. Ch. 187.

²⁹ E.g. *Morgan v. Morgan* (*supra*); *Benn v. Dixon* (1840) 10 Sim. 636; *Re Llewellyn's Trust* (1861), 29 Beav. 171; *Re Game, Game v. Young* [1897] 1 Ch. 881; *Re Wareham* [1912] 2 Ch. 312 (C. A.).

³⁰ *Chambers v. Chambers* (*supra*) at p. 190; *Lyons v. Harris* (*supra*) per FitzGibbon L.J. at p. 39—the other two judges in this case did not mention the lengths of the leases concerned; *Re Wareham* (*supra*) per Farwell L.J. at p. 317—neither Cozens-Hardy M.R. nor Kennedy L.J. mentioned the point here.

³¹ See cases cited in note (29) (*supra*); also *Craig v. Wheeler* (*supra*); *Pickering v. Pickering* (*supra*); *Green v. Britten* (*supra*).

³² The following words of Farwell L.J. in the Court of Appeal seem to suggest this. 'In this particular case counsel for the appellant said that some of the leaseholds were held for quite short terms, so that there is every probability of the tenant for life using up these leaseholds in her own lifetime. It was to prevent this that the rule was laid down . . .': *Re Wareham* (*supra*) at p. 317. Another suggestion of it occurs in *Gray v. Siggers* (1880) 15 Ch. D. 74, at p. 77. Counsel had urged that some of the leases there concerned were 'very short terms.' But Malins V.C. had found clear evidence in the will that the testator did not intend

Moreover, there are further unsatisfactory features about the rule in *Howe v. Earl Dartmouth*, as is shown by the enormous amount of litigation which has taken place for the purpose of deciding whether testators have shown an intention to exclude the rule.³³ Nor in general is it applicable to leaseholds situate abroad.³⁴

It is submitted, therefore, that practitioners should take special care to clarify the position when drafting residuary bequests of leaseholds to or upon trust for persons by way of succession—either (a) by inserting an *express* trust for sale, or (b) by showing clearly that no trust for sale is desired. Otherwise, even if the capacity of the rule in *Howe v. Earl Dartmouth* to create a trust for sale remains unaffected by recent legislation, doubts are likely to arise as to whether the rule is ousted in any particular case, either by the nature of the lease or by the testator's intentions on the construction of his will.³⁵

the rule to apply, and accordingly replied: 'I cannot look at the question whether the leaseholds are for long or short terms. . . .'

³³ *E.g.* *Howe v. Earl Dartmouth* (*supra*); *Goodenough v. Tremamondo* (1840) 2 Beav. 512; *Bethune v. Kennedy* (1835) 1 Myl. & Cr. 114; *Sutherland v. Cooke* (1844) 1 Coll. 498; *Green v. Britten* (*supra*); *Re Llewellyn's Trust* (1861) 29 Beav. 171; *Macdonald v. Irvine* (1878) 8 Ch. D. 101 (C. A.); *Gray v. Siggers* (1880) 15 Ch. D. 74; *Re Game* (*supra*); *Craig v. Wheeler*, 29 L. J. Ch. 374; *Re Nicholson* [1909] 2 Ch. 111; *Re Wareham* (*supra*). In the last-mentioned case the Court of Appeal held that many of the earlier cases (not cited here) were wrongly decided.

³⁴ *Re Moses* [1908] 2 Ch. 235.

³⁵ *Query* whether personal representatives are now able to exclude the rule entirely by exercising (with the necessary consents) their power of appropriation under A. E. A. 1925, s. 41. Property so appropriated will thereafter 'be treated as an authorized investment.' Moreover any appropriation of realty 'in purported exercise' of their powers under this section is deemed, in favour of a purchaser for money or money's worth, to have been duly made.

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NOTES ON RECENT CASES.

CONFLICT OF LAWS—SHIPPING—CARRIAGE OF GOODS—DISTANCE FREIGHT—
LAW APPLICABLE—PRESUMPTION IN FAVOUR OF LAW OF THE FLAG—
OVERRIDING INTENTION OF THE PARTIES.

The Adriatic. [1931] P. 241.

Two freight engagement notes were made in Egypt between the defendant X Co. a British company, carrying on business in London, with a branch office at Alexandria, and the plaintiffs, a firm carrying on business in Egypt, for the shipment of cottonseed from Alexandria to London by a steamer to be specified. The plaintiffs chartered a Swedish steamer, the *Adriatic*, for this purpose. All the documents, the freight engagement notes, the charterparty and the bills of lading were in English and on English forms. The plaintiffs signed the bills of lading as 'agents only.' During the voyage, the *Adriatic* came into collision with another vessel and on putting into Cadiz was found to be a constructive total loss. The cargo was discharged at Cadiz and the X Co. took delivery.

This action was brought for distance (*i.e. pro rata*) freight by the plaintiffs as trustees for the shipowners. Such distance freight, they alleged, was payable either under the law of the flag (Swedish) or the *lex loci contractus* (Egyptian). The X Co. contended that English law applied, under which distance freight was not payable.

Langton J. who gave judgment for the defendants, held that the test of what law was to apply was to be found in the intention of the parties—this much was clear from all the authorities. The presumption at law was that the effect and incidents of a contract of affreightment were governed by the law of the flag, 'Provided that the contract will not be governed by the law of the flag if, from the terms or objects of the contract, or from the circumstances under which it was made, the inference can be drawn that the parties did not intend the law of the flag to apply.' (Dicey, *Conflict of Laws*, 4th ed. p. 644, r. 166b.)

In this case, all the documents were in English and on English forms. Disputes under the charterparty were to be settled by arbitration in London and the plaintiffs here had actually sought their remedy in London. Delivery and payment were to be in England. The X Co. were a British firm carrying on business in England, with a branch office in Egypt where the British position had for many years been predominant. Consequently the inference was that the parties must have intended English law to apply. Besides, the freight engagement notes did not specify a ship of any particular nationality and although the Swedish ship was chartered after the first, and before the second, of the freight engagement notes, the plaintiffs did not even then tell the defendants that the ship in question was of any particular nationality, nor did they in any way reveal her identity, which certainly was unusual if the parties had intended the law of the flag to apply. The learned Judge went on: 'One cannot be going far wrong in saying that if one wants to divine the intentions of two business men, one may

take it that they intended to do what was most convenient' (p. 251). In all the circumstances of the case he held that English law must have been the most convenient law for the parties. Consequently it was held that the claim for distance freight failed.

This case merely illustrates that no rigid rule can be laid down in advance as to the law to be applied in such cases. Each case must be dealt with individually on its own merits. All the cases go on the footing that the law which is to govern depends on a variety of circumstances. The intention of the parties determines the issue; such intention is a question of fact in each case, to be arrived at only after due consideration of all the circumstances of the case.

K. K. L.

CONTRACT—MEASURE OF DAMAGE—PENALTY OR LIQUIDATED DAMAGES—
REASONABLE PRE-ESTIMATE—DAMAGES SUFFERED GREATER IN AMOUNT
THAN SUM STIPULATED IN CONTRACT.

Widnes Foundry (1925), Ltd. v. Cellulose Acetate Silk Co.
[1931] 2 K. B. 393.

THE defendants were manufacturers of artificial silk, and early in 1929 negotiated for the erection, by the plaintiffs, of a plant for the recovery of acetone used in the process, to be ready by July. At first the defendants pressed for delivery within eighteen weeks; the plaintiffs replied that they could not deliver before eight or nine months, but in view of the urgency of the case they finally agreed, in consideration of an extra £500, to do the work within eighteen weeks. The defendants also required a clause providing that if the contract were not completed within eighteen weeks, the plaintiffs should pay a sum of £20 by way of penalty for every week they were in default. The plaintiffs accepted this, the contract was concluded, and the period of eighteen weeks expired on July 27. The plant was not completely installed until thirty weeks later. The actual loss of acetone dated from September 3 to Jan. 3, and the defendants claimed as damages £5,850, the actual loss incurred. The plaintiffs contended that they were not liable beyond £600 under the penalty clause, arguing that a stipulated sum can only be construed as a penalty if exorbitant, but not if grossly inadequate.

In Wright J.'s view the relevant criterion, as laid down by Lord Dunedin in *Dunlop, etc. Co. v. New Garage, etc. Co.* [1915] A. C. 79, is whether it can be deemed to be 'a genuine covenanted pre-estimate of damage.' Historically, Courts of Equity and (by statute) Courts of Common Law were concerned with relieving against penalties where the penal sums were in excess of the damage; for the aggrieved party could always sue on the covenants and recover his actual loss where beyond the penal sum. Parties then began to substitute stipulations intended to define conclusively the damage recoverable, and in principle the test of disparity might be applied either way. In *Watts, etc. Ltd. v. Mitsui & Co., Ltd.* [1917] A. C. 227, Lord Sumner had held that the common form penalty clause in a charterparty which limits damages to the amount of freight is no more than a stipulation for a penalty, and that far more than that amount might be recoverable.

Wright J. held that the £20 a week was a penalty and not a pre-estimate of damage, and on this ground entered judgment for the defendants for £5,850, and for the plaintiffs for £19,750, the agreed cost of the plant.

The Court of Appeal held that the award of £5,850 was wrong and that plaintiffs were liable for £600 only. Their Lordships, following the tests laid down by Lord Dunedin in *Dunlop v. New Garage Co.*, were of opinion that the sum fixed was not a penalty, not being '*in terrorem*' of the offending party. The guarantee clause was introduced by the defendants themselves, and it was unintelligible if they could recover all the damage they had suffered; it was rather a provision for the benefit of the plaintiffs, to induce them to undertake the contract. Furthermore, the penalty clause in charterparty cases had always been relieved against because the amount was to be paid on a breach of any one of many stipulations of varying importance; in this case there was one stipulation—that relating to delay.

The test of liquidated damages was whether the sum could be regarded as a 'genuine covenanted pre-estimate,' but Scrutton L.J. pointed out that this phrase does not necessarily mean an accurate pre-estimate—for that may be almost impossible—but the fixation of a sum varying in its total amount by the extent of the delay.

Greer L.J. said that there were many events which the parties could not foresee, affecting the quantum of the damage, and added that quite commonly the damages during the early part of delay may be quite small, and later considerable.

Slesser L.J., following a *dictum* of Lord Finlay in *Watts v. Mitsui*, preferred to regard it as a limitation on the amount of damages, not as a pre-estimate of them, which he regarded as reasonable when the sum fixed was less than the possible loss.

Scrutton L.J. declined to say that a party is always prevented from recovering a larger sum than the figure mentioned in the contract, and indicated that he could get more than that amount if the sum mentioned were not an estimate of the damage.

M. G. D.

CONTRACT—MISTAKE IN FORMATION.

Bell v. Lever Bros. Ltd. (1932) 48 T. L. R. 133.

X AND Y were respectively chairman and vice-chairman of the Niger Co. controlled by Lever Bros. the respondents. Owing to the amalgamation of the Niger Co. with another company, the services of the appellants became unnecessary, and as consideration for giving them up, they were compensated with large sums of money. It was later ascertained that X and Y had been guilty of certain breaches of duty during their employment, such as would have given Lever Bros. the right to dismiss them without compensation. These breaches of duty had not been disclosed to them by X and Y. Lever Bros. sued X and Y for repayment of the compensation on the ground that the compensation agreement had occurred in consequence of a fundamental mistake of fact.

On proof that, if Lever Bros. had known the true facts before the

agreement, they would have dismissed X and Y, which would have been justifiable; that there had been no fraud or concealment on the part of X or Y; and that X and Y had honestly but mistakenly believed themselves to be entitled to compensation, Wright J. gave judgment for Lever Bros. on the ground of mutual mistake on a material point. This was affirmed by the Court of Appeal, who held alternatively that X and Y were under a duty to disclose their breaches of duty before the agreement. However, by three to two, the House of Lords reversed the decisions of the lower Courts.

Lord Atkin, after reviewing the authorities, concluded that the mutual mistake, if any, of the parties was not one as to the identity of the subject-matter of the contract. 'The contract released is the identical contract in both cases; and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way' (p. 151). His Lordship pointed out that there had been no representation or warranty by X or Y. He also dismissed the argument that there had been frustration of the contract of employment of X and Y by failure of an implied condition, for he considered that no such condition should be implied unless the new state of facts made the contract something different in kind from the contract in the original state of facts. Finally, as to the alleged duty of X and Y to disclose the dealings which would have founded a right to rescind the contract, he held that this contract was just like any other contract of service, where the servant was not bound to disclose past faults. It was not one of the contracts *uberrimae fidei*, where all material facts must be disclosed. He added that the maxim 'Caveat Emptor' applied outside the law of sale. Lords Thankerton and Blanesburgh concurred in effect, though the latter based his decision to some extent on a point of pleading.

Apparently then, the mistake made by Lever Bros. was not so fundamental as that made in *Scott v. Coulson* [1903] 2 Ch. 249, where the sale of a life insurance policy in respect of one who, unknown to the parties, was already dead, was rescinded; or as in other cases cited by the noble and learned lords. But the difficulty of drawing a distinct line between fundamental and non-fundamental mistake is certainly not lessened for the future.

Finally, it might be asked why this case was not contested on a rather different ground, namely, on a contract implied by law (*i.e.* a quasi-contract). In certain definite cases, although there has been no express agreement between the parties, the law will imply a contract. One of these cases occurs where money has been paid over to another in ignorance or mistake of a fact, a fact which, had it been true, would have made the person paying liable to pay. It has even been held in these cases that the mistake need not have been mutual. The form of the action is for 'money had and received.' 'Payment under mistake' was in fact pleaded (p. 138, column 2). Was the plea dropped because the mistake operated on the compensation agreement and not on the payment?

H. A. E.

CONTRACT—OFFER AND ACCEPTANCE—ACCEPTANCE OF CONDITIONS PRINTED ON A RAILWAY TICKET NOT ACTUALLY KNOWN AT THE TIME OF ACCEPTANCE.

Penton v. Southern Railway. [1931] 2 K. B. 103.

THE plaintiff bought from the Southern Railway a ticket at a cheap rate. On the face of the ticket was printed clearly and legibly 'For Conditions see Back,' and on the back were the conditions, one of which exempted the company from liability for personal injury however caused. On the journey, the plaintiff suffered personal injuries through the alleged negligence of the company's servants. In an action for damages against the railway the jury, in the county court, were unable to agree as to whether all steps reasonably necessary had been taken to bring the conditions to the notice of the passengers, and the defendants thereupon claimed that judgment should be entered for them on the grounds that there was not sufficient material for the jury to find for the plaintiff. This was refused and the defendants appealed. The appeal was allowed and judgment was entered for the defendants.

Swift J. said that there were innumerable cases on the point but he did not propose to discuss all of them because the principles involved were clearly stated by the Court of Appeal in the latest of them, *Thompson v. L. M. S. R. Co.* [1930] 1 K. B. 41. The facts of that case were similar except that the conditions referred to were printed, not on the ticket, but in the company's books and time-tables, and the ticket was available only on a special excursion train. It was there held that in cases like this the contract is made by the acceptance of the ticket, and that acceptance of the ticket is acceptance of all the conditions of the offer, so long as they are easily ascertainable and there can be no doubt of their existence; that is, so long as all steps reasonably necessary have been taken to bring the conditions to the notice of the offeree, the offeree is bound by them. In that case the passenger was held to be bound although she could not read. The county court judge had distinguished *Thompson's Case* on the ground that there was there an obligation to expect special conditions when they were available on a special train, but that on an ordinary train there was no obligation to expect conditions other than ordinary conditions unless something more than merely printing the conditions on the ticket had been done. He (Swift J.) did not think there was sufficient distinction between excursion and ordinary trains to admit different principles but, assuming there was no obligation to expect special conditions (which was very doubtful since the plaintiff knew he was getting a ticket at greatly reduced prices) he could not see what further steps the company could reasonably be expected to take as the words 'For Conditions see Back' could not help being seen by anyone looking at the ticket. All reasonable steps had been taken and the plaintiff was bound by the conditions and could not recover. The county court judge, in spite of the disagreement of the jury, should have entered judgment for the defendants. Macnaghten, J., agreed.

Beyond establishing that the same principles apply to tickets available on all trains, this case only seems to illustrate well-settled principles laid down in numerous cases (see *Watkins v. Rymill* (1883) 10 Q. B. D. 178, and *Thompson v. L. M. S. R. Co.* [1930] 1 K. B. 41) and stated in this

case: namely that to render conditions printed on a ticket binding it is necessary to show either (1) that the other party knew of them; or (2) that all steps reasonably necessary were taken to bring them to his notice.

C. H. H.

CONTRACT—PRINCIPAL AND AGENT—AGENT CARRYING ON TWO BUSINESSES
—ESTATE DEPARTMENT—BUILDING DEPARTMENT—SALE OF HOUSE—
ESTATE DEPARTMENT ACTS AS AGENT FOR VENDOR—BUILDING DEPARTMENT ACTS FOR PURCHASER—RIGHT OF ESTATE DEPARTMENT TO COMMISSION.

Harrods, Ltd. v. Lemon. [1931] 2 K. B. 157.

THE plaintiffs carried on an estate agency and a building department in separate buildings. The defendant employed the services of the estate agency to find a purchaser for her house, and about July 3, 1929, with her authority they arranged for a sale of the property to C. for £7,500 'subject to contract and a surveyor's report.' C. then engaged the services of the plaintiffs' building department to inspect the premises. As a result of the inspection, the department reported that £400 would be needed to put the drains in proper condition. At this stage it was quite unknown in the plaintiffs' estate department that their building department was acting for C., and it was equally unknown in the building department that the estate agency was acting for the defendant. C. then wrote to the defendant stating that the estimate for repairing the drains was £400 and that there would therefore have to be a reduction in the purchase price. It was then discovered by the defendant that the plaintiffs were acting for C. and when this fact was communicated by her to the estate agency they offered to advise C. to have the drains tested by another firm. The defendant did not accept this offer and the building department continued to act for C. The contract of sale was then completed at a price reduced in consequence of the work that had to be done to the drains. The plaintiffs' estate agency now claimed £167 10s. commission on the sale of the property.

At the trial before Avory J. it was argued for the plaintiffs that there had been no breach of duty by the plaintiffs to the defendant. The advice to C. was in no way inconsistent with the duty as agent to procure the best possible bargain for the principal. The vendor had concluded the sale with full knowledge of the facts.

For the defendant it was argued that although there was no fraud or dishonesty nevertheless as agents the plaintiffs had been guilty of misconduct disentitling them to their commission. Juridically Harrods, Ltd. was one entity even though it had two branches, and seeing that it was the agent of the defendant it could not lawfully accept an agency for a person with conflicting interests such as C. without full disclosure to, and permission of, the principal (*Fullwood v. Hurley* [1928] 1 K. B. 498, 502).

Avory J. gave judgment for the plaintiffs, and the Court of Appeal, in affirming this, took substantially the same grounds. Avory J. had held that the plaintiffs were one person, however many businesses they might carry on, and the Court of Appeal seems to have taken this for

granted; further it emphasized the principle that no agent, in the course of his agency and in the matter of his agency, can be allowed to make a profit without the knowledge and consent of his principal. For the rest, it was held that the decision must turn entirely on the question of knowledge; when it became known to the defendant that her agent was acting in a dual capacity there was as yet no contract of sale. At that stage there were three courses open to her. She might have put an end to the contract of agency and taken the whole matter out of the plaintiffs' hands. She might have said, 'I will have nothing to do with this purchaser you have introduced because I will not get the best price from her, having regard to the drains,' and then she might conceivably have sued the plaintiffs if she could have proved that any damage was suffered. Finally, she might have offered to go on with the sale and get an external report on the drains. This was the course offered by the plaintiffs themselves. What she was not entitled to do was to accept the purchaser introduced by them and then refuse to pay the commission. The appeal was therefore dismissed.

H. E. P. W.

CONTRACT — PURCHASE OF LAND — WRITING — COLLATERAL ORAL TERM TO CONSTRUCT ROAD—HOW FAR A SEPARATE CONTRACT—UNDERTAKING TO CONSTRUCT ROAD NOT AN INTEREST IN LAND—LAW OF PROPERTY ACT, 1925, s. 40.

Jameson v. Kinmell Bay Land Co., Ltd. (1931) 47 T. L. R. 593.

THIS appeal from the Divisional Court, which had affirmed a decision of the judge at Rhyl County Court, raised two questions, (i) the variation of a written agreement by a collateral oral promise; (ii) the meaning of 'contract for the sale or other disposition of land or any interest in land' under the Law of Property Act, 1925, s. 40.

The defendants, who owned land, employed S. as agent. S. met the plaintiff on the land, and a conversation took place in which S. told the plaintiff that a road was to be constructed close to the plot which the plaintiff was intending to buy from the defendants, and that this road would be suitable for all purposes of access to his land. Relying on this promise the plaintiff on August 16, 1928, entered into a contract to purchase the plot. This was conveyed to him on November 17, and he proceeded to build a bungalow upon it. He now complained that although two years had elapsed, the road had not been made, and he claimed damages.

The defendants denied the alleged promise and alternatively said, (1) that the claim was an attempt to vary a written agreement by parol evidence, as the contract to construct the road was a term in the contract to purchase as a whole, and (2) that the alleged promise to construct a road must be in writing, as it dealt with an interest in land.

The county court judge decided in favour of the plaintiff and awarded £25 damages. The judges of the Divisional Court upheld that decision. They thought that on the authority of *Erskine v. Adeane* (1873) L. R. 8 Ch. 756, they could not say that the county court judge was wrong in law in holding (a) that the contract to construct the road was a separate

contract, and (b) that the promise was not an 'interest in land' within the meaning of section 40, sub-section 1 of the Law of Property Act, 1925.

The Court of Appeal, in affirming this decision, held (1) that the oral promise did not form part of the contract, but was a separate contract, and that evidence of its terms could be given without contravening the rule that parol evidence may not be given to vary the provisions of a written agreement. They referred to Lord Moulton's opinion in *Heilbut, Symons & Co. v. Buckleton* [1913] A. C. 30, 47, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract, I will give you £100,' is a complete legal contract, collateral to the main contract and independent of it. (2) That a promise to construct a road was not a 'contract for the sale or other disposition of land or any interest in land,' and consequently that an action would lie upon it, although it was oral, without infringing section 40, sub-section 1 of the Law of Property Act, 1925. It was a mere collateral agreement to do certain work on land which remained in the contractor's ownership.

Although extrinsic evidence is not admissible for the purpose of adding a new term to a written contract, extrinsic evidence is allowed to prove that the parties to the written contract did enter into another and oral contract, collateral to it. But the oral contract must not contradict or be inconsistent with the terms of the written contract: *Erskine v. Adeane* (*supra*). In *Heilbut, Symons & Co. v. Buckleton* (*supra*), Lord Moulton said that collateral contracts 'must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.'

H. P.

CRIMINAL LAW—EVIDENCE—PERSONAL VIOLENCE BY HUSBAND TO WIFE—
WIFE CALLED AS WITNESS FOR CROWN NOT ONLY A COMPETENT BUT
A COMPELLABLE WITNESS.

R. v. Lapworth. [1931] 1 K. B. 117.

L. WAS convicted of causing grievous bodily harm to his wife, who was compelled by the trial judge to give evidence against L. L. appealed to the Court of Criminal Appeal which dismissed the appeal.

Counsel for L. pointed out that there had been no decision on the point in this country, but that in a South Australian case, *R. v. Phillips* [1922] S. A. S. R. 276, where a wife was charged with wounding with intent to murder her husband, it was held that the husband was a competent but not a compellable witness. This decision was based on that in *Leach v. R.* [1912] A. C. 305, 311, where the House of Lords held that a spouse was made a competent witness in certain offences mentioned in the Criminal Evidence Act, 1898, but not a compellable one, and in *R. v. Lapworth* it was argued that this applies

generally in the common law; and that moreover in *Leach v. R.* Lord Loreburn L.C., Lord Atkinson and Lord Halsbury had each separately asserted that the principle of a wife not giving evidence against her husband was deep rooted in the common law of the land.

Counsel for the Crown argued that the decisions in *Leach v. R.* and *R. v. Phillipps* were concerned with the interpretation of the Criminal Evidence Act, 1898, and an Australian Statute respectively, which conferred competency on witnesses previously unable to give evidence, but not compellability. The principle at common law, apart from statute, is that competency involves compellability. In *Lord Audley's Case* (1631) 3 St. Tr. 401, no suggestion was made that Lady Audley was not a compellable witness in the trial of her husband for abetting a rape upon her. It was clear that the law lords had not any of the excepted cases of competency at common law in mind when they made their general statements in *Leach v. R.*

The Court held that there could be no doubt of competency in a case of this type, and that therefore the spouse must, like all other witnesses, be compellable. There was no direct authority as the point had probably been generally recognized and had never been called into question before. The passages in the speeches of the law lords in *Leach v. R.*, though apparently general statements, were confined to the effects of section 4 of the Criminal Evidence Act, 1898, which had expressly authorized a husband or wife to give evidence against his or her spouse in certain cases. In that case Lord Halsbury said: 'I should have thought that if the known state of the law was that, in order to confer competency, you had to enact it, the fact that you simply use the word 'competent' did not necessarily mean "against his or her will."' The Court of Criminal Appeal took this to mean that 'if the known state of the law is such as to confer competency without a statute, then compellability follows as a matter of course from that fact.' In *Leach v. R.* the law lords had not present to their minds the particular case of a husband doing violence to his wife. The appeal therefore was dismissed.

The interest of the case lies in the fact that it is the first reported English case to lay down that at common law a husband or wife is, like all other witnesses, compellable when competent.

B. C. E.

PERSONAL PROPERTY — BAILEE — INNKEEPER — DAMAGE TO GUEST'S CAR —
INJURY BY FROST — LIABILITY OF INNKEEPER.

Winkworth v. Raven. [1931] 1 K. B. 652.

THE plaintiff was a guest at an inn of which the defendant was proprietor. During his stay he left his car in the garage of the inn. He knew that the garage had only three sides and was open on the fourth, but he did not know whether there was a heating apparatus there. While the car was in the garage the water in the radiator froze and the car was injured.

In the county court judgment was given for the plaintiff. The ground for the judgment was that the innkeeper had taken the car to garage it for reward, that he should therefore have taken all reasonable pre-

cautions to protect it from harm, and that he had failed to heat the garage properly.

On appeal the Divisional Court reversed this decision.

The liability of the defendant, said Swift J., could be determined only by ascertaining exactly what was the relation between him and the plaintiff. The relation might be that of warehouseman, garage proprietor or innkeeper. In this case the relation was that of innkeeper only. The general principle is that an innkeeper is an insurer against theft of the goods of his guests brought to his inn, subject to certain exceptions. But the innkeeper is not an insurer of the person of the guest nor of the latter's goods generally; see *per* McCardie J. in *Maclean v. Segar* [1917] 2 K. B. 325, 328; he is responsible only in case of injury to the guest or his goods if negligence on the part of the innkeeper is proved. An innkeeper is not necessarily a warehouseman or garage proprietor, but he may assume such a position for himself, and thereby take upon himself the duties attached to such a position. In this case he had not assumed such a position.

It was suggested that the defendant owed the duty of providing a place in which his guest could garage his car safe from damage by frost. The duty was not so high as this. An innkeeper is bound only to supply such accommodation for his guest and his goods as he possesses: *Fell v. Knight* (1841) 8 M. & W. 269; *Browne v. Brandt* [1902] 1 K. B. 696. A traveller could not expect to find in a village inn the amenities of a large city hotel; the innkeeper undertook only that his accommodation should be reasonably fit for the purpose.

The garage in this case was suitable in ordinary weather conditions and the plaintiff was aware of its unsuitability in frost. The defendant had not failed in any duty he owed to the plaintiff.

H. W. H.

PERSONAL PROPERTY—GIFT—UNDUE INFLUENCE—INFLUENCE OF INTENDED HUSBAND.

Re Lloyds Bank, Ltd.; Bomze and Lederman v. Bomze. [1931] 1 Ch. 289.

B, a man, and L, a woman, were betrothed. L's brother provided £4,000 as a dowry for L. By an agreement signed on May 6, 1929, between B and L, L was to deposit £4,000 at a bank in the joint names of B and L, and the sum was to be re-deposited on marriage on a current account in the names of B and L, which account could be drawn upon by both B and L. The agreement further provided that the £4,000 was to be used in paying off a mortgage of £1,200 on premises occupied by B, and in buying B a medical practice; and that if the marriage did not take place before 1930, the £4,000 should be repaid to L. It was not intended that anything should be withdrawn before the marriage. This took place on June 15, 1929. In spite of the terms of the agreement certain sums had already been withdrawn by B and L. On May 15 they withdrew £1,000 with the knowledge of L's brother, and on June 5 a further sum of £2,350. On this occasion L's brother only consented to, and knew of, £350 being withdrawn. B used the £2,000 to pay off

a charge on his premises, of which L's brother knew nothing. After the marriage further sums were withdrawn for their current expenses.

Only £150 remained in the joint account, and, the parties having separated in September 1929, this action was brought by B's wife and her brother, who sought an order setting the agreement aside, and for the repayment of the £4,000. B claimed that this sum had been given to him outright by the agreement.

Maugham J. decided that the agreement of May 6 could not be set aside, since L was acting with the advice of her brother, who had drawn up the agreement. As to the withdrawals he distinguished between those that took place before the marriage and those when B and L were husband and wife. There was a great difference between gifts from a wife to her husband and gifts from a young woman to her intended husband. It was well settled that the relation of husband and wife was not one that created a presumption that undue influence had been exercised: the burden of proof in such a case lay upon persons alleging such influence: *Howes v. Bishop* [1909] 2 K. B. 390. If a wife authorized her income to be paid to her husband, she could not recall such a gift: *Caton v. Rideout* (1849) 1 Mac. & G. 599. But the position of a woman engaged to be married was very different. Usually she reposed such confidence in her intended husband that she would sign almost anything he put before her. The doctrine of *Huguenin v. Baseley* (1807) 14 Ves. 273, applied to such a relationship; *i.e.* a presumption of undue influence arose. There was authority for this view in *Lovesy v. Smith* (1880) 15 Ch. D. 655, where it was held that the intended husband was under a duty to explain, in the most unmistakable terms, the provisions of a settlement that were in his favour.

As regards the sum of £1,000, it could not be recovered, apparently because L had her brother's independent advice. But B had not established that the sum of £2,000 was a proper gift; an independent adviser would have insisted that the charge should be transferred to L. The withdrawals after the marriage were for current expenses, and came within the principle of *Caton v. Rideout*, and could not be recalled.

L. G. L.

PERSONAL PROPERTY—DONATIO MORTIS CAUSA—DONOR SUFFERING FROM INCURABLE DISEASE BUT DYING FROM ANOTHER CAUSE.

Wilkes v. Allington. [1931] 2 Ch. 104.

THE question to be decided in this case was whether T had made an effective *donatio mortis causa* in favour of his nieces, the children of his deceased brother.

In 1922, on the death of A, his property passed to his widow for life, who, in 1923, mortgaged the property to A's brother, T. She died in 1923, having appointed in her will as executrixes her daughters, who were the nieces of T. In 1922, T discovered that he was suffering from an incurable disease. Three years later he thought he was dying and said to his nieces: 'I have instructed F. P. (one of his executors) to give you back that mortgage when I am gone; tear it up.' In 1927

he left an envelope at his nieces' house which, when opened, was found to contain the mortgage. On the front were the words, 'Mortgage relating to Astwood,' and on the back, in T's own writing, 'Deeds relating to Astwood. To be given up at death. T.'

During the next month, T was apparently in his normal health, but at the beginning of 1928 he caught a chill and died of pneumonia. Evidence was given that he had previously said that he intended to restore the mortgage but that he expected interest to be paid on it during his lifetime. The plaintiffs, his executors, now claimed that the mortgage and interest were still in force and demanded the restoration of the mortgage.

For the defence it was submitted that all the claims of a valid *donatio mortis causa* had been satisfied and that the mortgage had not been handed over merely for safe custody, as T had a safe of his own. The fact that he died from pneumonia when he was suffering from cancer was immaterial. To this the plaintiffs replied that there was nothing to indicate an intention to revest the property in T if he recovered and that the defendants were mere custodians of the mortgage.

In delivering judgment Lord Tomlin referred to the essential conditions of a valid *donatio mortis causa* as defined by Lord Russell C.J. in *Cain v. Moon* [1896] 2 Q. B. at p. 286. Three facts must combine:—

(i) The gift must have been in contemplation though not necessarily in expectation of death.

(ii) There must have been delivery to the donee of the subject-matter of the gift.

(iii) It must be shown that the gift was to revert to the donor if he should recover.

It was admitted here that there had been a delivery, and, according to *Duffield v. Elwes* (1827) 1 Bli. (N.S.) 497, delivery of the mortgage-deed was a good release of the mortgage debt. There was also a contemplation of death; Williams on Executors (12th ed. at p. 479) had been cited to show that the gift must be conditioned to take effect only upon the death of the donor by his existing disorder, but no authority had been adduced for this proposition. In fact, *Re Richards* [1921] 1 Ch. 513, favoured the view that a gift made upon contemplation of death is not conditional on death taking place only in a particular manner. The real point here was, did T intend an absolute gift *in futuro*, reserving to himself the interest during his life, or was it a gift to the defendants to be returned in the event of his recovery? In the opinion of the noble and learned lord, T had changed his mind; originally, he had intended that there should be no gift till he died, as appeared from the endorsement on the envelope; afterwards, however, when death seemed nearer, he decided to hand it over immediately. The Court held that there was ample evidence of T's intent that the mortgage should be returned in the event of his recovery, and that there had been a valid *donatio mortis causa*; it was immaterial that he did not die of the expected cause, and the action must be dismissed with costs.

S. D.

REAL PROPERTY—FIXTURES.

Spyer v. Phillipson. [1931] 2 Ch. 183.

WHETHER the principles on which the law dealing with tenant's fixtures is based have been altered in the past hundred years is a disputed point. In *Leigh v. Taylor* [1902] A. C. 157, Lord Shand took the view that the law had changed, saying (p. 162): 'I rather think that in the progress of time the law has been developed in the direction of holding what would at one time have been held to be parts of a building to be now temporary fixtures only,' while Lord Macnaghten took the opposite view (p. 162): 'I do not think the law has changed. The change I should say is rather in our habits and mode of life.' Whichever interpretation of the gradual development in the cases is the correct one, it can hardly be doubted that a hundred years ago a Court would not have reached the same conclusion as did the Court of Appeal in *Spyer v. Phillipson* [1931] 2 Ch. 183. The lessee of a flat installed in it certain valuable antique panelling, chimney pieces and fireplaces, the panelling being placed in position by inserting into the wall wooden plugs, to which it was attached by screws. It is obvious that this method of annexation was far more permanent than was that used in the case of the tapestries in *Leigh v. Taylor* (*supra*), but this did not prevent the Court from reaching the similar conclusion that the ancient maxim 'Quicquid plantatur solo solo cedit' did not apply. The present case has finally established the principle that neither the method nor the degree of annexation is of importance in determining the question of the tenant's right to remove the fixtures except in so far as they throw light on the intention with which the chattel was affixed by the tenant to the demised premises. (See Romer L.J.'s judgment at p. 209.)

A. L. G.

REAL PROPERTY—INFANT HEIR OF INTESTATE—SETTLED LAND ACT, 1925,
s. 1—DEATH OF INFANT UNMARRIED—DEVOLUTION OF ESTATE—
ADMINISTRATION OF ESTATES ACT, 1925, s. 46, SUB-S. 1; s. 51, SUB-S. 3.

Re Taylor; Pullan v. Taylor. [1931] 2 Ch. D. 242.

IN September, 1925, T died intestate, and in November his widow took out administration to his real estate. T was seised of Blackacre in fee simple in possession. He left a widow and three children of whom the elder son A was his heir. On January 1, 1926, the Settled Land Act, 1925, came into operation, and under section 1, sub-section 2, A's land became settled land under a settlement 'deemed to have been made by the intestate,' the widow's right of dower being preserved under sub-section 3. In May, 1926, the widow appointed herself and the plaintiffs as Settled Land Act trustees. In 1930 A died an infant, unmarried and intestate.

The question then arose as to whether the land passed to the widow,

A's mother, under section 46, sub-section 1 (iv) of the Administration of Estates Act, 1925, or whether his interest had become an estate tail under section 51, sub-section 3, and had ceased to exist; in the latter case there was a further question as to what became of the reversion in the original intestate, T. Section 46, sub-section 1 (iv) lays it down that if an intestate leaves no issue and one parent, then 'subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the surviving father or mother absolutely.' Section 51, sub-section 3, however, provides that where an infant dies unmarried, who would 'have been equitably entitled under a settlement (including a will)' to a vested estate in fee simple, such infant shall be deemed to have had an entailed interest, 'and the settlement shall be construed accordingly.'

It was argued for the widow that the words 'settlement (including a will)' in section 51 were limited to actual dispositions by deed or will and would not apply to mere notional statutory settlements; and that even if the section did apply, the freehold reversion in the intestate T would devolve again upon A, and the problem of where it rested would repeat itself *ad infinitum*, and this could not have been the Legislature's intention.

Farwell J. however held that the expression 'settlement (including a will)' included a mere notional settlement deemed to have been made by the intestate: he had 'great difficulty in believing' that such a special provision was not intended to apply to all settlements of any kind, including notional ones. The situation then was that A's interest, under the Settled Land Act, was treated as derived from a settlement deemed to have been made by the intestate, and by section 51 of the Administration of Estates Act the Legislature had said to him 'If you attain twenty-one or marry, the estate is yours absolutely. Otherwise it is only an entail.' The reversion did not oscillate perpetually between the intestate T and his heir A; A inherited once for all in 1925. The Legislature gave him an estate tail and wiped it out on his death unmarried under twenty-one. Inheritance to the reversion in T must be traced from T, and, as A had no further claim, Blackacre went to the next heir of the intestate who in this case was a younger son, B. B now only takes an entail until he attains twenty-one or marries, when his estate becomes absolute. It is to be noted that the interest which descends to B is still subject to the widow's right of dower.

The main point of interest in this case lies in the fact that if an infant dies unmarried who would have been equitably entitled under a settlement to an estate in fee simple or absolute interest in freehold land or in any property settled to devolve therewith, then for purposes of devolution his interest is regarded as entailed. This gives the estate back to the grantor, and prevents it from devolving on relations whom he possibly never intended to benefit.

W. S.

REAL PROPERTY — RESTRICTIVE COVENANT — NO BUILDING SCHEME — COVENANTS NOT EXPRESSED TO BE FOR THE BENEFIT OF ADJACENT LAND — COVENANTS NO LONGER EFFECTIVE — DECLARATION BY COURT UNDER LAW OF PROPERTY ACT, 1925, s. 84, SUB-S. 2 — LAND REGISTRATION ACT, 1925, s. 82.

Re Sunnyfield. [1932] 1 Ch. 79.

M, the applicant on this summons, was a freeholder of premises which a predecessor in title, on buying them from the Ecclesiastical Commissioners, had covenanted for himself, his heirs and assigns to use not otherwise than as a private residence and not for any purpose which might be injurious to the lands retained by the covenantees, their successors or assigns. These restrictions were registered. The applicant was unable to sell the premises unless the covenants could be proved no longer effective. M applied for a declaration, under section 84, subsection 2 of the Law of Property Act, 1925, that no part of the premises was any longer affected by any of the restrictions, and for the cancellation of the restrictions in the Charges Register.

Maugham J. held that as there had never been a building scheme, and as the benefit of the restrictions had never been expressly assigned or expressed to be for the benefit of adjacent property of the Commissioners or of any defined area near the premises, there was no one who could enforce the conditions, which therefore no longer affected the premises.

The principles to be applied are contained in the three cases on which the learned judge based his decision: *Renals v. Cowlishaw* (1878) 9 Ch. D. 125; 11 Ch. D. 866; *Rogers v. Hosegood* [1900] 2 Ch. 388, and *Reid v. Bickerstaff* [1909] 2 Ch. 305. These cases establish that before the assignee of a covenant can show that he is entitled to the benefit of the restrictions, he must prove that he retains land that can be protected, that the covenant was annexed to such land, and that he is the assignee of the benefit of the covenant. One way of satisfying this last condition is by proving that the land is held as part of a building scheme.

It was with the application of these principles that the Court was concerned, and the questions which the learned judge was called upon to decide were:—

(1) Whether there was a building scheme in the technical sense, under which purchasers from the Ecclesiastical Commissioners came under covenant to conform to the restrictions for the benefit of the estate in course of development. On the authority of *Reid v. Bickerstaff* it was held that the necessary facts had not been established to enable the Court to come to the conclusion that there was a building scheme in the legal sense. The question remained:

(2) Whether, apart from a building scheme, the restrictive covenants could be enforced by successors in title of the original covenantees. Held, that they could not, the conditions noted above not having been fulfilled.

The land held by M was thus no longer bound by the covenant, and it was therefore not necessary for her to rely on the provisions of the Act to show that her land ought no longer to be bound by the restrictions.

She relied on the Act only in so far as it gave the Court power to make the necessary declaration relieving her from the restrictions and ordering their cancellation in the Charges Register.

The case finally shows that the mere registration of a restrictive covenant will not make the benefit of it run with the land, unless the conditions necessary to the application of the equitable doctrine have been fulfilled. If they have been, the covenantee or his successors may still be met with the defence that the covenant has not been registered and can therefore not be sued upon.

T. R. W.

REAL PROPERTY—SETTLEMENTS OF UNDIVIDED SHARES IN LAND—MERGER
—LAW OF PROPERTY ACT, 1925, s. 39, SCHEDULE I, PART IV.

Re Egton Settled Estate, [1931] 2 Ch. 180.

IN 1909 a settlement was made by deed of an undivided moiety in the Egton Estate, and the settlor subsequently by his will devised the other undivided moiety in the estate to the uses upon the trusts and subject to the powers of the original settlement, or such as might be subsisting at his death; and appointed the trustees for the time being of the said settlement to be the trustees of all the hereditaments thereby devised for the purposes of the Settled Land Acts. The settlor died in 1910 and his will was duly proved. In 1930 the tenant for life under each of these settlements died and administration of his estate was granted to the surviving trustees of the settled land vested in the tenant for life at his death.

The plaintiffs, who were two of these trustees, issued the summons to have it determined whether the entirety of the estate, undivided moieties in which had thus been settled, became vested under the Law of Property Act, 1925, in the Public Trustee upon the statutory trusts under section 39, and Part IV of the First Schedule of that Act; or whether the same remained settled land, and in that event in what persons the land was vested. The defendant was the person entitled as tenant for life on the death of the previous tenant for life without male issue.

Eve J. found that the land must be treated as settled land, remaining such despite the provisions of the Law of Property Act and being vested in the special executors. The two moieties had been settled by separate instruments, the deed and the will; but the limitations were identical and at the relevant date the entirety was in the possession of the same individual as tenant for life. Hence it was impossible to hold that prior to January 1, 1926, the land was still held in undivided moieties.

The learned judge found himself unable to accept the contention of counsel for the trustees who submitted that the case fell under section 39 of the Law of Property Act and Part IV, paragraph 4 of the First Schedule to the Act. Section 39 provided that the transitional provisions of the First Schedule should have effect (*inter alia*) for subjecting land held in undivided shares to trusts for sale, and Part IV, paragraph 4 of the Schedule vested land which fell within its terms in

the Public Trustee upon the statutory trusts. Counsel further maintained that although there were two settlements of property upon the same limitations these could not be treated as one aggregate estate to be deemed settled land for all the purposes of the Act (Settled Land Act, 1925, s. 91), because section 117, sub-section 1 (ix) of the same Act defined land as '... any estate or interest in land not being an undivided share in land.' And furthermore a compound settlement did not involve merger (*Re Coull's Settled Estates* [1905] 1 Ch. 712). The more correct view was that put forward by counsel for the defendant, that there was a complete merger on the death of the settlor. The case did not fall within section 91 of the Settled Land Act, 1925, which dealt with two settlements of two estates on the same limitations. The legal estate in the entirety was vested in the tenant for life who before 1926 could have sold as tenant for life of the entirety. As the learned judge had no difficulty in deciding, there had been a complete merger on the death of the settlor and the tenant for life was deemed to have appointed the trustees of the settlement 'special executors' of the property.

V. M. C. P.

TORT—CONVERSION—ASSERTION OF RIGHT OF PROPERTY IN GOODS.

Oakley v. Lyster. [1931] 1 K. B. 148.

The plaintiff agreed in 1925 to pull down an aerodrome on Salisbury Plain, to clear away the structure, and to reinstate the land. He had to remove 8,000 tons of hard core and tar macadam, of which he became the owner. He rented some land near by and stored thereon 4,000 tons, of which he had not yet disposed. While his tenancy still subsisted the defendant bought the freehold of this land. The plaintiff proposed to sell some of the 4,000 tons to X, but the defendant, through his solicitors, informed the plaintiff that he might not remove the hard core as he (the defendant) had purchased the land and the core on it.

The plaintiff brought an action for conversion of the core. Judgment was given in his favour. The defendant appealed. The appeal was dismissed.

It was argued for the appellant that the judgment was wrong in that no conversion had been committed within the definition in Salmond on Torts, 7th ed. p. 375.

Scrutton L.J. pointed out that on page 394 Salmond states that there may be a conversion, although the defendant does not come into physical possession of the goods, if his act amounts to an absolute denial and repudiation of the plaintiff's right.

The argument for the defendant was based upon whether or no the plaintiff had expressed his claim rightly. The learned Lord Justice showed however that with regard to granting a remedy, this in no way hindered the Court, which was empowered to give the correct legal judgment upon the facts before it. Here clearly the defendant ought to be liable in damages for his interference with the plaintiff's property which he admitted was made under a mistaken claim of right. It was not, however, by any means clear that the plaintiff

had framed his action wrongly; in his opinion conversion had been committed. He relied for his definition of conversion upon the statement of Atkin J. in *Lancashire and Yorkshire Ry. Co. v. MacNicol* (1918) 88 L. J. K. B. 601, 605, in which he regarded as essential to conversion 'an intention on the part of the defendant . . . to deny the owner's right or to assert a right which is inconsistent with the owner's right.' He did not see how *England v. Cowley* (1873) L. R. 8 Ex. 126, 131, helped the appellant, as in that case Kelly C.B. had said: 'Apart from mere *dicta*, no case, so far as I am aware, can be found where a man not in possession of the property has been held liable in trover unless he has absolutely denied the plaintiff's right.' In this case the defendant had definitely denied the plaintiff's right by claiming the hard core as his own. His act came therefore within the modern definition of conversion.

Greer L.J. and Slesser L.J. in their judgments concurred in the view that the defendant's assertion of ownership in the hard core was a conversion.

The case shows plainly that the attitude of the Courts, where the plaintiff does not bring his action in the correct form but states the facts, is to decide according to the legal rights of the parties in view of the facts. Further it makes it very clear that to constitute conversion it is not necessary actually to be in possession, so long as one definitely asserts a right to the exclusion of the owner.

An acute criticism of this case in 47 *Law Quarterly Review*, 168—171, should be noted.

H. N. S.

TORT—CONVERSION—SALE IN MARKET OVERT—CITY OF LONDON.

Ardath Tobacco Co., Ltd. v. Ocker and Another. (1931) 47 T. L. R. 177.

THE tobacco company claimed the sum of £337 10s., the value of 150,000 cigarettes, which, it was alleged, the defendants had wrongfully converted to their use.

The facts of the case were as follow:—It was not the practice of the plaintiffs to deal with cut-price tobacconists, and they kept a black-list of such tobacconists for reference. When an order was received, it was the duty of the plaintiffs' clerk to see that it came from an approved customer, and to pass it on to the invoice department, where it was executed; the clerk had no authority either to receive orders in his private capacity, or to sell on behalf of the company.

The clerk by fraudulent representations procured an order from Ocker to the plaintiffs for 200,000 cigarettes; and then got the plaintiffs to deliver the cigarettes by representing that the order came from one Martin, an approved customer of the plaintiffs. The cigarettes were delivered at a railway station addressed to Martin, and Ocker got possession of them by signing 'for Martin,' and paid the clerk.

Finlay J. held that Ocker was liable for conversion of the cigarettes, for the property in them had never left the plaintiffs.

The part played by the second defendant, Bardega, is still more interesting. Ocker was introduced to him by an old customer, and offered

to sell him 150,000 cigarettes; in a telephone conversation he agreed to buy if the delivery note was produced. Ocker brought the cigarettes to Bardega's shop in Fleet Street, and produced the delivery note; Bardega took delivery and paid the agreed sum. He pleaded that the goods were sold to him in market overt under the custom of the City of London which extends that term to all shops within the city, and that the goods were bought in good faith and without notice of any defect or want of title. It was submitted on his behalf that although there was no decision dealing with sales to tradesmen, yet the general principle of protection accorded to *bona fide* purchases in market overt was wide enough to cover the present case. Finlay J. however held that, in the first place the question of market overt did not arise, since the main part of the transaction did not take place in the defendant's shop, Ocker having arranged to be introduced to him, and the agreement having been made by telephone; secondly, that even if the question did arise, a sale to a tradesman in his shop in the City of London could not be held, in the absence of evidence of such a custom, to be a sale in market overt. It was the opinion of the Court that very curious results would follow if it were held that every sale to a tradesman in his shop in the City of London was beyond question. The point was much more fully discussed in *Hargreave v. Spink* [1892] 1 Q. B. 25, where Wills J. held, though it was not necessary to his actual decision, that sale to a shopkeeper was not protected.

In the interests of trade, protection is granted to those who honestly purchased goods which are publicly displayed in the market-place. This is reasonable, since a vigilant owner has a chance of discovering the article he has lost, while, on the other hand, the purchaser is free from any suspicion that attaches to secret dealings. This historical reason for the rule certainly does not exist in the case of sales to tradesmen, the rule itself being an exception to the principle '*Nemo dat quod non habet.*'

W. K. F.

TORT — DEFAMATION — LIBEL — CARICATURE USED AS ADVERTISEMENT FOR GOODS — WHETHER REASONABLY CAPABLE OF BEARING DEFAMATORY MEANING.

Tolley v. J. S. Fry & Sons, Ltd. [1930] 1 K. B. 467; [1931] A. C. 333.

THE defendants, a firm of chocolate makers, issued, as an advertisement of their goods, a caricature of the plaintiff, a prominent amateur golfer, depicting him as playing golf with a packet of their chocolate protruding from his pocket, and a caddy was represented with him, who also had a packet of chocolate, the excellence of which he likened to the excellence of the plaintiff's drive.

This was published without plaintiff's consent, who sued for libel, alleging that the statement meant, and was understood to mean, that plaintiff had agreed to have his portrait exhibited for purpose of advertising defendants' chocolate, that he had done so for reward, and had thereby prostituted his reputation as an amateur golfer.

At the trial evidence was given that if an amateur golfer lent him-

self to such a scheme, people might think he was no longer an amateur, and he might be forced to resign from his clubs. It also appeared that defendants had notice of such possible effects upon the amateur status of persons thus caricatured.

Defendants admitted publication but denied that the words complained of meant, or could possibly have meant, what the plaintiff alleged. The words were incapable of a defamatory meaning.

Acton J. ruled that the advertisement was capable of a defamatory meaning, and left the case to the jury, who found for the plaintiff and assessed the damages at £1,000.

Upon an appeal it was held by the Court of Appeal (Scrutton L.J. dissenting) (1) that the judge ought to have withdrawn the case from the jury, and (2) that the damages were excessive.

The plaintiff appealed to the House of Lords upon the first ground only, and it was held by four to one (Lord Blanesburgh dissenting) that in the circumstances the publication was capable of bearing the meaning alleged in the innuendo, and a new trial was ordered on the point of damages.

In the Court of Appeal Greer and Slesser L.JJ. held that the words and picture complained of could not clearly convey to an ordinary person that the plaintiff had received money for allowing his name so to be used. To support this view *Capital and Counties Bank v. Henty* (1882) 7 App. Cas. 741, was adduced, where it was decided that a refusal by a brewer circulated to his customers to accept in payment any further cheques drawn upon the plaintiff bank, was not a libel upon the bank, because in the circumstances there were no special facts to show that the words bore any but their *prima facie* meaning. Scrutton L.J. however dissented and thought that there was ample evidence that 'the cartoon was capable of being construed by reasonable men as a publication impugning Mr. Tolley's amateur status.'

In the House of Lords this view was followed, and Lord Hailsham said that, although he was not satisfied that it would not be open to the jury, acting on their own knowledge as reasonable citizens, to assume that no reputable firm would have the effrontery to take the name of a well-known man and use it for advertisement without his consent, yet (if it were needed) ample evidence of this could be found in the correspondence between the defendants and their advertising agents.

This is clearly a most satisfactory decision. It should be noted that the question of a right to privacy, which was raised by Greer L.J. ('The defendants in publishing the advertisement . . . were guilty of an act for which there *ought* to be a legal remedy') was not discussed. As Professor Winfield points out in an article in the 47 L. Q. R., p. 23, Mr. Tolley was suing for defamation and not invasion of privacy. In any case it is doubtful whether such a right exists in our law, but here it was not material for the decision. Lord Blanesburgh possibly had in mind this aspect of the case when he said that the advertisement was 'only another instance of the toll levied on distinction for the delectation of vulgarity.'

P. H. D.

TORT—JOINT TORTFEASORS—DOGS WORRYING SHEEP IN CONCERT—OWNER OF EACH DOG LIABLE IN FULL—DOGS ACT, 1906, s. 7, SUB-S. 1.

Arneil v. Paterson. [1931] A. C. 560.

In this Scottish appeal to the House of Lords, the facts were as follow. Two dogs (the property of different owners, Paterson and X) acting together, attacked a flock of sheep and injured several. An action for damages under the Dogs Act, 1906, was brought by the owners of the sheep against Paterson and X, claiming a joint and several decree against the respondents. Paterson alone defended the action and claimed that he was liable for one-half only of the damage.

The Sheriff-Substitute granted a joint and several decree against the respondents. The First Division recalled the decree of the lower Court and found the respondent Paterson liable for one-half only of the damage. The decision of the First Division was reversed by the House of Lords which held that when once liability under the Act was established, the ordinary measure of damages had to be applied; that, in law, each of the dogs occasioned the whole of the damage as a result of the two acting together, and that, consequently, each owner was responsible for the whole.

Viscount Hailsham in giving judgment said that there were two elements before the Court which had to be determined: first, the element of liability; and secondly, when liability was established, the element of damage. The ground of liability rested upon the provision of the Dogs Act, 1906, s. 1, sub-s. 1, which provides: 'The owner of a dog shall be liable in damages for injury done to any cattle by that dog; and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such previous propensity, or to show that the injury was attributable to neglect on the part of the owner.' It was conceded that the above section imposed liability on the respondent for the injury done to the sheep.

The second element, that of damage, had then to be decided. It was contended by the respondent that since his dog was concerned with another, in the absence of evidence as to how much injury each dog actually did, each must be held responsible for only half the total damage. But this view was a mistaken construction placed upon the statute and the statute only alters the common law rule on the question of liability. Once liability is established, then the ordinary measure of damage had to be applied. It had to be ascertained how much injury 'that dog' had done to the cattle, in this case the appellant's sheep. Each of the dogs did in law occasion the whole of the damage which was suffered by the sheep as a result of the action of the dogs acting together; in which case each of the two owners of the two dogs was responsible for the whole of the damage done, and judgment could be obtained against either of them.

The respondents cited the case of *Piper v. Winniffrith* (1917) 34 T. L. R. 108. The headnote in that case stated that the mere fact that the two dogs acted together without any connected action by their owners did not make their owners joint tortfeasors, and therefore the judge was entitled to divide the damages as he had done. The case was one in which apparently two dogs were owned by two different people living in

the same house, and during the night the two dogs did a certain amount of damage to the plaintiff's sheep.

Viscount Hailsham considered that the case did not seem to be clearly reported and that the headnote did not seem to be justified by the facts as found nor by anything in the judgment, and that there was no evidence of the dogs acting together. It would appear (though the House of Lords did not say so) that a statement attributed to Atkin J. in the report (as distinct from the headnote) in *Piper's Case* cannot be accepted: he is reported to have said that the dog-owners could not be joint tortfeasors unless there were 'some connected action' on their part.

A. L. L-T.

TORT — NEGLIGENCE — MACHINE ERECTED ON LAND OF THIRD PARTY —
INVITATION TO PUBLIC TO USE MACHINE — FATAL ACCIDENT — WHETHER
THIRD PARTY LIABLE.

Humphreys v. Dreamland (Margate), Ltd. (1931) 144 L. T. 529.

THE defendants were the proprietors of a piece of land known as 'Dreamland' situated at Margate, on which they invited people to come for amusement. No charge was made for admission to Dreamland, but the owners of the various shows put up there by agreement with the defendants made their own charges for admission to their shows. On part of this ground a machine known as 'The Atlantic Flyer' was erected by one S under an agreement made between him and the defendants. For this concession S was to pay the defendants one-third of the gross receipts. The issue of tickets to, and the control of, the show itself were in S's hands. Advertisements inviting people to come to Dreamland were issued by the defendants. The plaintiff's son, on whom she was partly dependent, took a ticket for 6d on the Atlantic Flyer. One of the bolts holding the car gave way and he was thrown from the machine and killed. Held, that it was S alone who had the right to invite customers to make use of his machine and that the defendants neither had the right in law, nor did in fact invite the deceased man to incur the risk resulting in his death.

The Court of Appeal, affirming the decision of Shearman J., held that there was no contract between the deceased and the defendants upon which the defendants could be held liable; and further that there was no duty, independent of contract, owed by the defendants to the deceased to take reasonable care to see that the Atlantic Flyer was safe, since the relation of invitor and invitee had not been established.

The House of Lords affirmed this decision.

Lord Buckmaster pointed out that it was essential to consider what the invitation was that Dreamland issued. It was admitted that the defendants had issued advertisements asking people to come to Dreamland, but these advertisements did no more than invite people to the area of land owned by the defendants. They could not be considered as an invitation to enter any side show. Thus the action based upon the view that there was an invitation to property on which there was a hidden danger under the control of the invitor failed, and it became

necessary to see whether the circumstances arising out of the contract with S involved such a responsibility. The plaintiff alleged that the gatekeeper of S's show was the defendants' servant, and that consequently the contract for admission was made with them. This contention could not prevail. That the person who received the money was the defendants' servant was true, but only for a limited purpose. He was not their servant for the purpose of either admitting or excluding people to or from the show. For this purpose he was responsible to S. When therefore he issued the ticket he made no contract, expressed or implied, with the deceased on behalf of Dreamland, and for this reason the appeal must fail.

K. S. R-H.

TORT—NUISANCE—SPECIAL DAMAGE—STATUTORY DUTY TO MAINTAIN LOCK
—COLLAPSE OF LOCK.

Blundy, Clark & Co., Ltd. v. L. N. E. Ry. Co. [1931] 2 K. B. 334.

THE defendants were under a statutory duty to keep open and in good repair for the use of all persons the locks upon a certain canal, and to do so without any unnecessary hindrance or interruption to navigation. The plaintiffs were gravel merchants who made considerable use of the canal and locks in transporting sand and gravel from their works from a point west of M. lock eastwards to the city of York, where they sold it. Without any fault of the defendants the M. lock collapsed: thereafter the defendants failed to start repairs on the lock until four months had elapsed, with the result that the merchants had their business interfered with, were obliged to transport their gravel by other means at considerable expense, and were deprived of the use of some of their barges.

The plaintiffs brought an action for (*inter alia*) damage (i) caused by the defendants' breach of duty in failing to maintain and repair the lock; and (ii) caused by unnecessary delay in rebuilding the lock. The Court of Appeal held that the defendants were liable only for their failure to repair the lock within a reasonable period, there being no other negligence on their part than this: and that the plaintiffs were entitled to damages in that they had suffered special and particular damage above that sustained by the public generally.

This trial occupied various Courts for fifteen days in all, and raised some troublesome questions of law. One of particular interest to students is the following:—

The defendants' objections were based primarily on the rule that in cases of public nuisance—as this case was—only those who showed 'particular' or 'special' damage beyond that sustained by every member of the public could sue; and that the plaintiffs showed no such particular damage. This defence entailed a lengthy legal argument as to the interpretation and meaning of 'special and particular damage' in public nuisance. Many cases were cited by both sides.

Counsel for the defence argued that *Wilkes v. Hungerford Market Co.* (1835) 2 Bing. N. C. 281—where plaintiff succeeded in claiming damages for loss of profits in his business as a bookseller by reason of

the inconvenience to customers caused by defendants' wrongful blocking of a public highway—had been overruled by the House of Lords in *Ricket v. Metropolitan Ry. Co.* (1867) L. R. 2 H. L. 175, which was alleged to have been followed in *Winterbottom v. Lord Derby* (1867) L. R. 2 Ex. 316. *Ricket's Case* was a decision on the Lands Clauses Consolidation Act, 1845. The result, counsel urged, was that a private person who claims to have a cause of action in respect of a common nuisance must prove more than mere loss of profit by reason of the inconvenience to customers resulting from the defendants' wrongful act.

Counsel for the plaintiffs, on the other hand, argued that *Ricket's Case* had not overruled the *Hungerford Market Case*, but had merely decided that, on a true interpretation of the Lands Clauses Acts, claims for compensation under these Acts are limited to damages done to the property affected and do not extend to damage done to a business or trade. Further, they cited *Caledonian Ry. Co. v. Walker's Trustees* (1882) 7 App. Cas. 259, following *Metropolitan Board of Works v. McCarthy* (1874) L. R. 7 H. L. 243: in the former case the House of Lords did allow the claimant even under the Lands Clauses Act to recover compensation—where he complained of the closing of a public highway and substituting for it a lengthier road of a steeper gradient than the way closed, whereby the value of his house was diminished.

From these conflicting arguments, Greer L.J. certainly, and Scrutton L.J. apparently, held that the *Hungerford Market Case* ought to be followed, preferring the authority of the two cases cited above.

Slessor L.J. *contra*; but he reached the same decision as his brethren by another route. The exact authority of *Wilkes' Case* cannot therefore be regarded as yet settled.

E. E. Y.

TORT—TRESPASS—LICENCE—LICENCE TO ERECT TELEGRAPH WIRES ON CROWN LAND—LICENCE BY ACQUIESCENCE—REVOCABILITY OF LICENCE—ABSENCE OF CONTRACT—NOTICE NECESSARY TO DETERMINE LICENCE.

Canadian Pacific Railway v. R. [1931] A. C. 414.

THE point at issue in this appeal to the Judicial Committee of the Privy Council was the legal position of the Canadian Pacific Railway Company and the Canadian Government Railway with regard to a line of telegraph poles which the company had placed on Crown lands.

The line of poles consisted of three sections which had been placed in position at different times and which were considered separately in the judgment since the circumstances of their erection differed. The chief legal interest of the case, however, centred round the position of the 'Main Telegraph Line' section, for the Court had little difficulty in deciding that the 'Branch Line' and the 'Westville Line' sections had been constructed under an implied licence from the Crown. In both cases negotiations for a permanent agreement had fallen through, but in spite of this fact the company had erected the lines with the Crown's tacit consent from which a licence could be inferred. The main telegraph line was begun in the year 1888, and, to quote the judgment, the facts

down to 1905 'may fairly be summed up by saying that while leave to erect the line on Crown property had been refused, the appellant had succeeded in placing a relatively small number of poles on Crown property, some with leave and some without' (pp. 420—421). In 1905 rebuilding began and by 1914 substantially all the poles of the line had been set up on the track of the Intercolonial Railway. At intervals between 1890 and 1926 when the present suit was instituted, the Crown requested the company to remove its poles or alternatively to pay rent for them. In view of these facts the Crown claimed damages and mesne profits for trespass or alternatively a declaration of the rights of the parties, whilst the company claimed an irrevocable licence.

The Judicial Committee were unable to accept the view that the appellant was a trespasser throughout, and drew the following conclusions as regards the section under consideration. Although the placing of the poles upon the Government Railway was originally a trespass, they had remained there for a long period of years, a fact which must have come to the notice of the railway management. A licence from the Crown must be inferred from its long acquiescence and its claim for rent, and at the date of the suit the appellant could not be considered to be a trespasser.

The Court then considered whether and in what circumstances the licence referred to was revocable, and held that the circumstances of each case must decide what restrictions exist on the power of the licensor to determine the licence. Their Lordships further held that the doctrine of equitable estoppel outlined in *Ramsden v. Dyson* (1866) L. R. 1 H. L. 129, involved the necessity of a contract which could not be implied in the present case, and they supported their contention by reference to the case of *Lala Beni Ram v. Kundun Lall* (1899) L. R. 26 I. A. 58. But though the Crown was therefore at liberty to revoke the licence, *Cornish v. Stubbs* (1870) L. R. 5 C. P. 334, and *Mellor v. Watkins* (1874) L. R. 9 Q. B. 400, showed that the licensee was entitled to reasonable notice before his licence expired. Here the public also used the appellant's telegraph line, and had a very considerable interest in its continuance. Sufficient time must be allowed for the company to make other arrangements to carry on their telegraph service. It was a case in which grave injustice might issue if the contention of the Crown that its mere initiation of legal proceedings was enough to determine summarily the rights of the appellant or to turn the appellant's occupancy into trespass, were correct.

D. N. S.

WILL — CONSTRUCTION — BEQUEST OF HEIRLOOMS — MEANING OF 'BOOK.'

Re Tomline's Will Trusts; Pretymen v. Pretymen. [1931] 1 Ch. 521.

By his will made in 1889, T made a settlement of his lands, and his two mansion houses. He also bequeathed 'all the pictures, prints, statues, sculptures, articles of vertu, books, furniture, and plate, in my mansion houses,' to the trustees of the settlement, as 'heirlooms' upon stated trusts. T bequeathed his residuary personalty upon trust for sale. T died in 1889.

The present summons was brought by the tenant for life of the settlement to determine whether 155 of the original manuscripts of the Paston Letters, which were among the chattels in the mansion houses of the testator at his death, were 'books.' If they were not to be considered 'books,' they would pass under the bequest of residuary personalty, and might be sold. If, however, they were to be included as within the meaning of the word 'books,' then they passed under the bequest of 'heirlooms' and might not be sold without the leave of the Court. In the event of the manuscripts being considered 'books,' the tenant for life prayed for this leave.

The originals of the Paston Letters had been inlaid into sheets of paper, and then bound into three volumes, by Sir John Fenn, when he published them at the end of the eighteenth century. They were still preserved in this condition when they passed into the possession of the present tenant for life.

Maugham J. held that the manuscripts passed under the bequest of 'heirlooms,' as they possessed all the legal attributes necessary to constitute them 'books.' He gave leave for their sale subject to certain conditions.

He held that they should be accounted 'books' for four reasons. First, they were bound and looked like books; secondly, they could be used as books, their leaves could be turned over and the writing read on either side; thirdly, they could be read together as a whole; and fourthly, the letters could not be separated from the pages into which they were inlaid, except by mutilation. Further, there is no need for a book, as such, to be printed: many books are in manuscript form. He cited *Re Plowden* (1908) 24 T. L. R. 883, in which manuscript music by Beethoven and Mozart, firmly bound into covers, was held to pass under a bequest of 'books': *Willis v. Curtois* (1838) 1 Beav. 189, where medical entries made in writing by one of the physicians to George III and bound in a volume were held to be a 'book': and *Re Barratt* (1915) 31 T. L. R. 71, 502, where the written entries in the log of H.M.S. *Victory* passed under a bequest of 'books.'

The learned judge distinguished *Re Masson* (1917) 86 L. J. Ch. 753, where an album of postage stamps was held not to be a book, on the ground that the album was a mere accessory to the stamps and only a receptacle for them. He regarded his decision as fortified by the strong probability of its accordance with T's wishes—a consideration which the unwary layman would have regarded as the foundation of the judge's conclusions and not as a mere buttress of it. The question whether the letters also fell under the description 'articles of vertu' was considered, but nothing more explicit was said by Maugham J. than that an article of vertu must be in some sense a product of the fine arts.

P. F. P.

BOOK REVIEWS.

The Main Institutions of Roman Private Law. By W. W. BUCKLAND. Cambridge University Press. 1931. xii and 410 pp. (16s.)

IN the case of an author who knows so well what he wants to do, and how to do it, the preface to a book is likely to be the most informative review, and Professor Buckland sets out concisely what the object of this book is. It is intended 'to replace *The Elementary Principles of Roman Private Law* now out of print, but it is not a second edition of that book. It is more systematic in plan; it aims at giving a general view of the different institutions of the Private Law and of the notions which underlie them. But its purpose is the same: it is for the use of students who have read the Institutes and little more, and it is intended to stimulate rather than to inform.' Those who know Professor Buckland's work will guess that the 'little more' is not to be taken too literally. The book presupposes that the reader has already an intelligent understanding of the outlines of Roman law, and it is precisely because the author is not bound here to give elementary instruction as he goes along that he is able to achieve the stimulating effect at which he aims.

Characteristically there is no display of learning, but, as anyone can see who knows what the literature of the subject is like, almost every paragraph is based upon a penetrating analysis not only of the original authorities, but of a mass of modern work. It is difficult to choose in a book which covers so many topics, but the masterly way in which the obscure subject of pacts is treated at the beginning of Chapter XV and the whole chapter on security (XVII) impressed the reviewer especially, and so, in a rather different way, did the discussion of the *legis actio* system in Chapter XIX. In this last case Professor Buckland has allowed his pen a little more liberty than usual, and even a student who had not quite as much preliminary knowledge as the book generally requires, could hardly help gaining illumination. There is undoubtedly a good deal in the book which will appear technical to some readers, but this is part of the scheme. If Professor Buckland treats of *peculia* or alternative legacies, it is because such matters did in fact bulk largely in the actual work of a Roman lawyer, and it is his object to make us see the Roman Law as the Romans saw it themselves, and to understand the nature of Roman legal thought. What seems technical today was not by any means necessarily unimportant in Roman times. Gaius gives more space to rights in the goods of freedmen than to succession on intestacy to *ingenui*, and we may wonder why he should treat of the subject at length in an elementary book. The reason, as Professor Buckland points out, is that in the early Empire freedmen were a very large class, and often wealthy, so that the matter was one of very considerable practical importance. This strictly Roman attitude characterizes the whole book, as indeed it does the author's other works, and it sheds as much light on general problems as it does on details. The few pages

on *obligatio* (Chapter XIII) are a model of insight and restraint, especially in their treatment of the distinction between *debitum* and *obligatio* and its relation to that between *Schuld* and *Haftung*.

'Even in classical law,' writes Professor Buckland, 'though probably no such distinction was present to the minds of the lawyers, states of fact may be found which can be explained as expressing it.' It would indeed be difficult to find anyone else who could put so much truth into so few words, and no one could have written them without rigid adherence to the Roman texts and complete freedom from *parti pris*.

Equally good are the pages on the influence of Greek ideas and of Christianity (20—23). 'Greek influence is not necessarily the influence of philosophy. The practices which Diocletian sought to exclude, but which gradually crept in, were not directly expressions of Greek philosophy: they were the practices of trading classes in hellenized regions, with whom there was contact. They were borrowings, not of ideas for the jurist, but of ways of doing business; not of a philosophy, but of a way of trade.'

On the question of interpolations the author confesses in the Preface to a conservative bias, and it is well known that he has much in common with Professor Riccobono's view that the *Corpus Iuris* represents the classical law a great deal more closely than is now generally believed. But this does not prevent him from succeeding in his attempt to 'give a fair presentation of the opposite point of view,' and in fact he is not so very 'conservative.' What he does is to insist, as he has insisted in other works, that the classical period is not a unity, and that there was much creative work done between the time of Julian and that of Ulpian. This seems obvious when baldly stated, but much unsound theory would have remained unborn if all modern scholars had remembered it. When a man has written an authoritative and fully documented text-book, he is of course entitled, in subsequent works of a general character, to quote authorities as much or as little as he chooses, and Professor Buckland has made use of this liberty to give comparatively few references to the texts and none whatever to modern literature, except where he corrects something which he himself said in an earlier work. No doubt much can be found by looking up the text-book, and more will be available when the new edition of that work appears; no doubt also that there is no sense in referring the student, in this type of book, to a mass of authorities which he has no time to read and which are probably written in a language which he does not understand. But we cannot help thinking that the principle of exclusion has been too rigidly applied, and that some references should be given when the authorities are in English or French and easily accessible. It is really rather hard that the intelligent reader should not be told, for example, that he can find more about Professor Buckland's views on *animus furandi* in English in Vol. X of the *Tijdschrift voor Rechtsgeschiedenis*, and can get the text of the recently discovered papyrus fragments of Gaius' Institutes together with a discussion by Professor de Zulueta, in L. Q. R. XLIV. Those who have to study the subject of possession for the B.C.L. at Oxford would also be grateful if the discussion on acquisition through a third party were supplemented by a reference to the author's article on '*Constitut Possessoire*' in the *Revue Historique de droit Français et Etranger* for 1925. However, Professor Buckland could perhaps not be expected to break his rule in the case of articles which are mostly by

himself, and if he were the man to indulge in long citations he would hardly also be the man to write such delightful '*Bucklandiana*' as 'we see something in the texts and much more in the text-books,' or 'if the rule is not based on principle, we must not base a principle on it,' both of which will be found on p. 106. The *Elementary Principles* have been replaced by something even better.

H. F. J.

Jurisprudence. By Sir JOHN SALMOND, a Judge of the Supreme Court of New Zealand. Eighth edition. By C. A. W. MANNING, M.A., B.C.L., of the Middle Temple, Barrister-at-Law, Cassel Professor of International Relations in the University of London. London: Sweet & Maxwell, Ltd. 1930. xviii and 580 pp. (20s. net.)

THE merits and defects of the late Sir John Salmond's *Jurisprudence* have long been known to many readers of earlier editions. Written in a lucid style, the book embodies the mature thought of a lawyer who had spent much time at the bar and on the bench as well as in his study; and it is, indeed, the work of a great jurist who had read widely not only in jurisprudential writings, but also in the literature of many different systems of law. It is professedly a work on 'theoretical or general jurisprudence'; and, while far from omitting ethical and historical considerations, it deals primarily with that branch of general jurisprudence known as the 'analytical' (see pp. 1—9). In comparison with certain other works concerned with analytical jurisprudence, Salmond's treatise possesses merits which entitle it to a secure place in the literature of juridical thought; but at the same time it has some of the defects of nearly all works in which analysis plays a prominent rôle.

It is, in the first place, somewhat too dogmatic in many instances; it resembles far too much many a sermon preached from the pulpit. Moreover, while at times the reader knows of a certainty that the author is referring to Roman legal thought or to the theory of English law or to some other body of doctrine, far too often the same reader finds it impossible to tell whether the author has based his statement on a system of law, the writings of a jurist, or his own mind, which was so richly stored with original thoughts derived from a long life of study and reflection. On occasion, in fact, the text is a *mélange* drawn from various historical, ethical, and jurisprudential sources; and, while it may well be that this mode of writing is necessarily incident to the school of analytical lawyers who write on 'general,' as opposed to 'particular,' jurisprudence, it is nevertheless disconcerting at times to the one who is accustomed to distinguish, with some exactitude, between authority and speculation. Without failing to notice the stimulation to thought produced by a perusal of each and every part of Salmond's classic, it may be remarked that to many students those portions of the book, which are many, wherein there is professedly a dealing with the doctrines of English law, form, by all odds, the most valuable contribution of the author to his subject. Within the field of English law Sir John Salmond was an

acknowledged master, even though at times he blends the ethical and the legal, as in parts of his *Jurisprudence* and *Law of Contracts*.

Not only because it embodies much learning, based on wide reading, and prolonged thought, but also because, both in its content and in its outlook, it awakens interest, Salmond's *Jurisprudence* deserves to be read by the present generation of students; and, in order to keep it abreast of recent developments in law and in the theory of law, a new edition was clearly needed. After a perusal of Professor Manning's edition, which was prepared to supply this need, one may venture to remark that at one and the same time it goes too far and does not go far enough.

In the first place, it is believed that few of those who have valued their Salmond because they had before them the *ipsissima verba* of the master will welcome the editorial method, in general far too common in these latter days, which Professor Manning has adopted. The learned editor has made comparatively few changes in the text; but owing to the blending of his amendments with the author's own text, it is really quite impossible for the student to tell, in general, whether he is reading the words of Sir John Salmond or those of Professor Manning. In fact what we have in this new edition is a joint work by the original writer and the present editor: and, even though it be applied upon a very limited scale, this method of procedure, especially in dealing with a work of the character of Salmond's *Jurisprudence*, will no doubt strike many readers as the carrying of editorship far beyond its normal and proper limits.

On the other hand, as already observed, the changes introduced into the edition are few in number; and in this respect the work of editorship has not been carried far enough. Not only the growth of legal systems, but also the mass of recent literature on jurisprudence, much of it written in languages foreign to English, called for a critical examination of some parts of Salmond's text. Had the learned editor chosen to embark on extended and critical researches, and had he embodied the results of his study in signed notes of his own at the bottom of pages or at the end of the chapters, after the excellent manner of Sir Frederick Pollock's edition of Maine's *Ancient Law*, the edition produced might well have been of outstanding merit. Is it too much to hope that in the next edition we may have Salmond's own text restored to us in its integrity, accompanied at the same time by separate editorial matter which will inform the reader of the latest developments within that vast field of legal concepts to which the distinguished New Zealand judge devoted so much of his time of leisure? With such an edition before him the reader could at once distinguish between the text of Salmond and that of his editor; and the reader would also greatly value an editorial contribution, fresh and original, to the subject of Salmond's treatise. Moreover, an editor could do much, by means of his notes, towards furnishing an adequate gloss upon Salmond's text; and by so doing he could remedy some of those shortcomings to which reference was made in an earlier part of this present notice.

H. D. H.

Williams' Law and Practice in Bankruptcy. Fourteenth edition.

By WINTRINGHAM NORTON STABLE, M.A., of the Middle Temple, Barrister-at-Law, and JOHN BASIL BLAGDEN, M.A., of the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1932. cliv and 1088 pp. (£2 10s. net.)

THE editors and publishers are to be congratulated on producing an edition of Williams' standard work on bankruptcy that will be heartily welcomed by the profession.

Two omissions of matter contained in the thirteenth edition are to be noted:—the text of the Board of Trade circulars to trustees and members of committees of inspection; and those sections of the Bankruptcy Act, 1914, which are repealed by the Bankruptcy (Amendment) Act, 1926. It is to be observed, however, that the text of the Bankruptcy Acts, 1914 and 1926, and the editorial annotations thereon fill nearly one-half of the present edition (pp. 1—506); and where alterations are made by the Act of 1926 or other Acts subsequent to 1914 the words of the principal Act have been printed as they would appear in a consolidating Act. The space saved by the omissions mentioned has been used by printing the material sections of the Land Charges and Land Registration Acts, 1925, the material rules thereunder, a table summarizing their operation in so far as bankruptcy is concerned, and the material sections of the Moneylenders Act, 1927, with explanatory notes.

The edition contains the text, with annotations brought down to date, of many other Acts, rules, forms, and other documents and orders of value to practitioners in the Courts of Bankruptcy (pp. 507—931). But, omitting further reference to these matters, important though they be, attention should now be drawn to the fact that the learned editors have entirely revised, re-arranged, and largely re-written, the notes to sections 26 (discharge of bankrupt), 38 (bankrupt's property divisible amongst creditors), and 43 (avoidance of general assignments of book debts unless registered). About eighty pages of the text of the annotations of the work have thus been subjected to material changes by the present editors; and, without entering into detail, it may be remarked in general that the changes introduced greatly increase the usefulness of the treatise. The revision and re-writing of the notes on the important subject of bankrupt's property divisible amongst creditors account for about seventy of the eighty pages; and these seventy pages constitute the most valuable part of the literary labour of the editors. In this part both recent cases and statutes have been brought into the text, as, for example, those cases and statutes which have a bearing upon the important rule in *Ex p. James*, L. R. 9 Ch. 609 (pp. 230—234). Not only do we have in these pages a clear exposition of the rule, but we are also placed in possession of the latest information as to cases in which the rule is applied and those in which the Court refuses to apply it. Dealing with the principle known as the rule in *Ex p. James*, although the principle had been laid down in still earlier cases, the editors remark that 'generally, the trustee [in bankruptcy] will be ordered, as an officer of the Court, to do the fullest equity, and, indeed, in certain cases, an even higher standard of care is imposed on him'; and, as they state, 'it is not easy to define the exact bounds of a principle [which] operates

in a field not covered by the established rules of law and equity.' The application of the rule is not confined to cases where money has been paid to the trustee under a mistake of law; and, while these cases are of great interest, those in which the principle is carried still further (see, e.g. *Re Theellusson* [1919] 2 K. B. 735) are even more interesting and difficult.

As the editors remark, the principle seems to be 'incapable of reduction to an exact legal formula, and must in its application be governed in part by ethical considerations'; and in this respect, it may be added, the rule is in some respects comparable to the principle applied to the duties of auditors of companies (see Palmer, *Company Law*, ed. 1930, pp. 237—243) and of many other persons who hold a fiduciary or quasi-fiduciary position. In applying the rule in *Ex p. James* the bankruptcy Courts not only rely on established rules of law and equity, but they also operate within the sphere of moral justice; and it is this aspect of the matter which lends special interest to the principle. Without pursuing these reflections further it may be remarked merely that in cases where, under the rule in *Ex p. James*, an obligation is cast upon the trustee in bankruptcy to refund money paid to him under a mistake of law, there are fairly close parallels to certain well-recognized cases of quasi-contract and constructive trust.

Throughout the volume the learned editors have dealt with recent cases and new legislation; and, in general, they have performed their task with a high sense of scholarly precision and a marked regard to the needs of all lawyers concerned with the bankruptcy features of our system.

H. D. H.

Bureaucracy Triumphant. By CARLETON KEMP ALLEN, M.C., M.A., of Lincoln's Inn, Barrister-at-Law, late Professor of Jurisprudence and Fellow of University College, Oxford. Oxford University Press. London: Humphrey Milford. 1931. 148 pp. (5s. net.)

UNDER a somewhat provocative title, admirably suited to enlist the reader's interest, Professor Allen has republished in book form three articles which he contributed to the *Quarterly Review* (October, 1923, January, 1925, April, 1930) and a Paper which he read before the Society of Public Teachers of Law in July, 1928 (published in the Society's *Journal* for that year). No doubt the choice of a provocative title was intentional, for it is one of the learned author's chief purposes to stress the point that, owing to the growth of bureaucratic powers, both legislative and judicial, in this country, 'some of the constitutional principles which we have been taught to think most fundamental' must be re-examined (p. 1). Professor Allen has done far more, however, than the stressing of this single point, important as it is; for he has presented us with one of the most scholarly and thoughtful contributions to the study of that new branch of English law which has been given the title of 'Administrative Law,' but which may be better described, perhaps, as the 'Law of Public Administration' (see Wade and Phillips, *Constitutional Law*, 1931, p. 89). Nor have we in this small work merely

a summary of the principal views now held by many lawyers as to the nature of some of the new problems in government and their proper solution; for the author has himself done much, ever since the appearance of his first article in 1923, not only to mould professional and public opinion, but to inspire a considerable part of the ever-growing literature devoted to the study of one of the most important aspects of English public law at the present day.

The realization that 'we are faced with nothing more nor less than a constitutional crisis' (p. 74) has not led Professor Allen into a purely destructive criticism of the legislative and judicial powers now possessed by governmental departments. On the contrary, his main aim has been to examine dispassionately the present tendency of executive authorities to encroach upon the legislative and judicial spheres, to show the practical effect of this tendency upon litigation and legislation, and to suggest at least some of the modes whereby these newer growths of bureaucracy may be so controlled as to protect and enforce the rights of the subject. Professor Allen's book is, in fact, a reasoned attempt both to state the problems and to suggest the solutions, or at least some of them; and as one of the pioneer works in a new branch of our legal literature it will long enlist the close attention of students, lawyers, and statesmen alike.

Professor Allen draws a valuable comparison between the English 'Rule of Law,' or, in other words, the principle of equality before the law, and the French system of *droit administratif* (see especially pp. 45—56); and he is at some pains to point out the fundamental differences. Not less valuable are his suggestions as to the steps which might be taken to make English administrative law more like French *droit administratif* and German *Verwaltungsrecht*, and thus to secure to the subject in this country the special protections accorded by those continental systems (see especially pp. 61—73). Another important feature of the volume consists in the careful analysis both of decided cases and of views of writers on English administrative law, more particularly the views of Lord Sankey, Lord Hewart, Dr. Robson, Dr. Port, and Mr. E. C. S. Wade. Professor Allen's attack, originally published in 1928, on the proposal for administrative consultation of the judiciary (see p. 59) drew a reply from Mr. Wade (see 'Consultation of the Judiciary by the Executive,' L. Q. R. xlv, 169). This learned controversy did not, however, stop there: and the main points at issue between the two scholars are now set forth in the matter contained in an interesting appendix to Professor Allen's volume (pp. 132—141). A bibliography of administrative law, a note on legislative output, and a table of cases complete a book which is both illuminating and suggestive.

Professor Allen's suggestions as to the best methods of controlling the administrator, both as legislator and as judge, will undoubtedly assist Parliament in any future efforts which it may make to bring the new developments of administration into a more harmonious co-operation with the legislative and judicial elements of the constitution. 'Bureaucracy' in its modern sense, it may be safely assumed, has come to stay. In the process of curbing some of its present tendencies certain of the present functions of Parliament and the Courts of law may possibly suffer material changes; and it is indeed conceivable that the rule of law itself may come to have a meaning somewhat different from the one to be found in the works of Dicey and the older constitutionalists.

H. D. H.

A Compendium of Mercantile Law. By JOHN WILLIAM SMITH. Thirteenth edition. By PROF. H. C. GUTTERIDGE, M.A., LL.D., assisted by H. GOITEIN, LL.D., and H. J. S. JENKINS, M.A., B.C.L. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1931. ccxxvi and 888 pp. (£2 2s. net.)

A COMBINATION of scholarly presentation and practical efficiency characterizes this classic which holds a unique position in our legal literature. The exhaustion of the previous edition and recent statutory changes necessitated a thorough revision of a work which was within three years of its centenary, the first edition having appeared in 1834.

Sir John Macdonnell's valuable historical introduction appears in its original form with but slight alteration.

Book I (Mercantile Persons) comprises, Chapter I 'of Sole Traders'; Chapter II 'of Partners,' well illustrating what constitutes a partnership and wisely merging Chapter III of previous editions in its fifth section on Limited Partnerships. Chapter III, Incorporated Trading Companies, has been largely re-written and presents a clear view of the consolidated law in the light of the Companies Act, 1929, on this intricate subject. Chapter IV, Principal and Agent, follows a most logical arrangement, contains much critical matter and shows clearly the application of the legal principles involved. *Greer v. The Downs Supply Co.* [1927] 2 K. B. 28, in which the Court of Appeal refused to extend the doctrine of constructive notice to commercial transactions, although not laying down any new doctrine, might have been cited as illustrating the well-established rule in mercantile transactions.

The former Book II (Mercantile Property) has wisely been omitted, partly on the ground that no sufficient inherent distinction exists between this and other forms of property, and partly because the ever-increasing law of Merchant Shipping, Patents and Trade Marks could not be dealt with adequately in the compass of this volume and was hardly germane to the general spirit of the work.

Book II on Mercantile Contracts treats fully of Negotiable Instruments in Chapter I, incorporating a new Section viii on Cheques and Section xiii on Commercial Letters of Credit. This chapter is of outstanding merit, and though of great practical utility, does not neglect the theoretical aspects of the subject. *Liggett (Liverpool), Ltd. v. Barclays Bank* [1928] 1 K. B. 48, might be added to the excellent list of recent authorities on Bankers' Negligence in note (s), p. 273. Chapters II and III treat of Contracts with Carriers and Affreightment, the latter being for the most part re-written so as to embody the provisions of the Carriage of Goods by Sea Act, 1924, which was just too late to be incorporated in the twelfth edition. In view of Prof. Corbin's article 'Contracts for the Benefit of Third Parties,' L. Q. R. Vol. XLVI, p. 12, largely based on an attempt to generalize from cases such as *Les Affréteurs Réunis v. Walford* [1919] A. C. 801, the limited scope of their principle and rather anomalous character might advantageously be emphasized at p. 334. Further we should like to see a critical discussion of *Lord Strathcona S.S. Co. v. Dominion Coal Co.* [1926] A. C. 108, rather than its tacit acceptance on the same page. A very trenchant criticism of this case is to be found in Smith's Leading Cases,

Vol. I, p. 97. That such diversions are within the spirit of this treatise is shown by the wholly admirable explanation of *Lloyd v. Grace, Smith & Co.* [1912] A. C. 716, in the light of later decisions at p. 188. Marine Insurance is fully treated in Chapter IV, while Chapters V and VI give an adequate outline of Life and Fire Insurance, as does also Chapter VII of Bottomry and Respondentia. Chapters VIII—X of the previous edition, treating of Hire and Service, Contracts with Seamen, and Apprenticeship, are wisely omitted. Chapter VIII deals effectively with the somewhat complex subject of Guarantees. The treatment of *Couturier v. Hastie*, at p. 548, as the leading case on the superfluity of writing in contracts of *del credere* agency, at the expense of *Harburg India Rubber Comb Co. v. Martin* [1902] 1 K. B. 778 (which only appears in a footnote), is rightly followed, though its neglect at p. 648 in favour of *Barrow, Lane and Ballard v. Phillip Phillips* [1929] 1 K. B. 574, in expounding section 6 of the Sale of Goods Act, is regrettable.

Chapter IX on the Sale of Goods has been entirely re-written by Mr. Goitein and does him great credit. It is a thorough and comprehensive review of the subject in a little over 100 pages. Clarity of explanation and brief but instructive analyses of difficulties characterize it throughout. Small omissions are *Shepherd v. Kain* (1821) 5 B. & Ald. 240, from the discussion of section 13, Sales by Description; the well-known Scottish decision in *Aitken v. Boullen* (1908) 10 F. 490 (the maroon twill case) in contrast to *Jackson v. The Rotax Motor and Cycle Co.* [1910] 2 K. B. 937, in that of section 15, Sales by Sample; and *Phillips v. Brooks* [1919] 2 K. B. 243, from that of section 23. The recent case of *Buller & Co. v. Brooks* (1930) 46 T. L. R. 233, should be cited in treating of section 24. Chapter X, Contracts of Debt, contains much useful matter.

Book III, Mercantile Remedies, treats clearly and adequately in three chapters of Stoppage in Transitu, Lien and Bankruptcy.

The practical utility of the whole work as a book of reference is greatly enhanced by a very full table of cases to which the references have now been added and a new table of statutes, together with a first-rate index. The most commendable policy of stating both Case and Statute Law as at a particular date (here December 1, 1930) and adding recent references in the Addenda has been introduced and could be far more widely practised with advantage.

Professor Gutteridge and his assistants are warmly to be congratulated on their admirable achievement, and their skill and judgment in preserving in great part the original author's concise and lucid exposition while making room for the accurate introduction of much new and indispensable matter.

T. H. T.

Annual Survey of English Law, 1930. London: published by the London School of Economics and Political Science. 1931. xl and 328 pp.

THE third issue of the *Annual Survey of English Law* does not depart from the high standard set by the previous numbers. We know of no

other publication which gives so interesting and so accurate a bird's-eye view of modern English law as does this book.

In the past, Professor Edward Jenks and Professor H. C. Gutteridge have been outstanding contributors, and we join with the editors in the regret that their departure from the London School of Economics has deprived the *Survey* of their services. We welcome Professor R. S. T. Chorley, Mr. D. R. Seaborne Davies and Mr. G. W. Paton, who have brought new strength to the editorial board.

The original plan of the *Survey* has proved to be so sound that few changes have been made in the subsequent numbers. The only substantial departure in the present issue is a new Section covering recent publications in the field of jurisprudence. Mr. Jennings' reviews are original and kindly, and, in one case, surprising. His suggestion that Mr. Hallis's valuable work, *Corporate Personality*, 'might serve as an introduction to the philosophy of law' leaves us breathless. The same learned editor reviews the current literature on legal history. It may, at first sight, seem strange to find a page and a half devoted to Professor Trevelyan's *Blenheim*, but Mr. Jennings' interpretation of legal history is a catholic one.

There were few interesting cases on family law in 1930 with the exception of those dealing with actions in tort between husband and wife which are handled at greater length in the Tort Section. Perhaps students may be misled by the inclusion of *Hawley v. Alexander*, 74 S. J. 247, in this Section, for the liability of the mother, who had given an air-gun to her son, was not due to the fact that she was his mother, but was based on the principle that any adult who places a dangerous toy in the hands of a child is guilty of negligence. The relationship of mother and son had nothing to do with the case.

This year Professor Hughes Parry has been able to compress the Section on Property and Conveyancing into thirty-two pages. His discussion of the cases dealing with testamentary gifts to charities is of particular interest in view of the number of cases on this point in recent years. Perhaps some mention should have been made in the Section on Personal Property of the important case of *William Leitch & Co., Ltd. v. Leydon*, 47 T. L. R. 81, even though it is discussed at length later in the *Survey* in the Tort Section.

The contract, tort and criminal law cases have been admirably summarized by Mr. Seaborne Davies. In his report of *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.* [1931] 1 Ch. 274, we may suggest that more emphasis should have been placed on the judgments of the Court of Appeal than on that of Bennett J. in the Court of first instance, for although the two Courts reached the same conclusion they did so on different grounds. The discussion of the three cases dealing with the liability for injuries to trespassers—*Robert Addie & Sons v. Dumbreck* [1929] A. C. 358, *Excelsior Wire Rope Co. Ltd. v. Callan* [1930] A. C. 404, and *Mourton v. Poulter* [1930] 2 K. B. 183—is particularly clear and penetrating, and will prove of value to any teacher who has to attempt an explanation of the principles underlying these judgments. On the other hand we doubt whether that unsatisfactory case, *Oakley v. Lyster* [1931] 1 K. B. 148, is as simple as the learned editor seems to consider it (see note in 47 L. Q. R. (1931) 168—171).

Professor Chorley was fortunate in having a number of important cases to deal with in his Section on Mercantile Law, and he has stated

the complicated facts involved in some of them in a particularly lucid manner. It is interesting to note that his view of *The Croxteth Hall* [1930] P. 197, differs slightly from that taken by Dr. Robson in his Section on Industrial Law. Dr. Robson's analysis of the legislation dealing with his subject is of particular value, for in his summaries he attempts to state the principle, sometimes difficult to determine, on which the legislation is based.

The Section on Public International Law is divided between Professor H. A. Smith (case law), Dr. Lauterpacht (literature), and Miss L. P. Mair (International Documents and Conventions). As the flood of literature on this subject shows no sign of abating, Dr. Lauterpacht has to review thirty-five books in twenty-seven interesting pages.

May we suggest that a table of the books received ought to be included in the index? The need for such a table is emphasized by the present number, for the reviews are not arranged alphabetically and some of them are found in unexpected places. Thus, the notice of Goodeve's *Law of Personal Property* is found, not in the Section on Personal Property, as might be expected, but in that on Mercantile Law.

A. L. G.

Principles of the Law of Contracts. By the late S. MARTIN LEAKE, Barrister-at-Law. Eighth edition. By R. R. A. WALKER, of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1931. cxciv and 1088 pp. (£2 5s. net.)

THE seventh edition of Leake's treatise on the law of contracts appeared in 1921, under the editorship of the late A. E. Randall; and now, after a lapse of ten years, the eighth edition has been published under the editorial care of Mr. R. R. A. Walker, who deserves high praise for the painstaking and scholarly manner in which he has performed his heavy task.

Although Mr. Walker has adhered to the plan, adopted by Leake and followed by Randall, of making the work a convenient digest of the principles as derived from the cases, he has nevertheless incorporated, in revising the text, not only the gist of the case law, but also the effect of the legislation of the last ten years. The reader will welcome the restoration of the marginal notes, which were omitted from the seventh edition; but, although the table of cases, filling nearly three hundred pages, will be of great help to users of the work, they will sadly regret that the editor and the publishers have not seen fit to include a table of statutes, which nowadays forms, or should form, an essential part of the mechanism of a legal text-book. While the learned editor has made a brave attempt to improve the index, no doubt he is right in thinking that he has pleased only himself; for no index is really satisfactory to anybody but the maker thereof. Although Mr. Walker has very nearly entitled himself to be called, in the words of Goldsmith's publisher, 'a dab at an index' (see p. v), one misses from his index certain familiar headings, such as 'charge,' 'equities,' and 'quasi-contract.' It is, however, easier to criticize an index than to make one; for proficiency in

the art of index-making comes only after long experience and repeated attempts.

Having in mind the sharp controversy as to whether the principle of *Re Polemis* [1921] 3 K. B. 560 applies to cases in contract as well as to cases in tort (see Salmond and Winfield, *Law of Contracts*, 1927, p. 506), it is interesting to observe that, while Mr. Walker does not specifically deal with the rule in *Re Polemis*, he nevertheless cites the case in a footnote and apparently regards it as applicable to damages in contract (see p. 810, note (r)). It is to be hoped that in a future edition Mr. Walker will make a clear statement as to his position in reference to the *Polemis* decision. In the meantime, however, one may remark, in passing, that liveliness has been brought into the paragraph on remoteness of damage (pp. 810—811) by quoting Blackburn's apt comment, in *Hobbs v. L. & S. W. Ry.* L. R. 10 Q. B. 111, 121, that 'this vague rule [is] something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day.'

Two further points may be mentioned. The brevity of the text has sometimes resulted in the omission of important points. Thus, by way of example, while mention is made of debentures as creating floating charges, there is no reference to the possibility that such a security may later crystallize into a fixed charge (see p. 940). On the other hand, it should be observed that Mr. Walker has been careful to draw attention to changes in the law of contracts effected by recent property legislation (see, e.g. on signing a deed, p. 95; on judgment debts, pp. 114—115; on covenants running with the land, pp. 943—968, *passim*; on assignment at death, pp. 975—989, *passim*).

H. D. H.

The Theory of Legislation. By JEREMY BENTHAM. Edited for the International Library of Psychology, Philosophy and Scientific Method, with 40 pages of introduction and 40 pages of notes, by C. K. OGDEN. (7s. 6d. net.)

THE name of Jeremy Bentham deserves to be considered for inclusion in any select list of men distinguished by sheer massiveness of intellect. Upon the question how far he was original or even profound opinion has differed remarkably. The tendency of the last generation has been to believe that he was neither. He is fortunate in having found a champion in the encyclopaedic Mr. Ogden, who cannot be ignored when he commits himself to the opinion 'that Bentham's merits, in spite of his great and deserved influence on the nineteenth century, are only now coming to be realized; that with every decade after the centenary of his death (1932) the significance of his achievement will become more obvious; and that fifty years from to-day he will stand out as one of the greatest figures in European thought, along with Réaumur, Leibnitz, Newton, Malthus, or Helmholtz.' The grounds given for the view that the full recognition of Bentham's work is still to come are:—his theory of language and linguistic fictions; his contributions to the

problem of an international language; his insight into the psychology of values, in conformity with the most recent tendency of criticism; his proposals for the codification of nearly every legal system in the world, and particularly the Constitutions of South America; his services to International Law; his work on the foundations of humanitarianism and public health.

The object of Mr. Ogden's notes on *The Theory of Legislation* is to provide references to the more important modern literature of the subject. So far as citations of psychological writings are concerned there is of course no one more competent to do this. But one was not prepared to find in the learned editor so exhaustive an acquaintance with jurisprudential literature, American and Continental; not even Professor Goodhart or Professor Laski could have furnished a more judicious documentation in this field.

There is one allusion which invites mention for reasons of domestic interest, not because of its intrinsic importance. It is stated (on p. 506) that Samuel Bentham (Jeremy's brother) had started on his career at the Admiralty before 1799, 'when Nelson, under the influence of Lady Hamilton and the "Dear Queen" of Naples, regarded himself as owing allegiance to Ferdinand of Naples rather than to his own sovereign,—to the extent of violating an armistice and disobeying his orders.' It is not widely known that, thirty years ago, Dr. H. C. Gutteridge, K.C., whose return to Cambridge has so notably enriched the Law Faculty, spent several months searching the libraries of Spain and Italy for evidence with regard to this alleged incident. Nelson took an active part in the suppression of the Parthenopean Republic in 1799 and in the restoration of the Neapolitan Bourbons. He was violently attacked on the subject by Fox and others, who believed that he was influenced by Lady Hamilton and Queen Caroline of Naples, and charged him with bad faith in refusing to carry out an armistice between the Royalist forces and the Parthenopeans, and with acting vindictively in ordering the execution of Caracciolo the Parthenopean admiral. Dr. Gutteridge discovered evidence which, though not conclusive, convinced him that Nelson is cleared so far as any imputation of bad faith is concerned. He claims, further, to have proved beyond doubt that Lady Hamilton had nothing to do with the cancelling of the armistice, and that if there was any bad faith it was on the part of Cardinal Ruffo. Dr. Gutteridge published his conclusions in *Nelson and the Neapolitan Jacobins*, 1903, Vol. XXV, of the Navy Records Society series. Though generally accepted by naval historians they have been attacked in *A Great Adventuress*, 1912, by Turquan and D'Auriac.

To return to Bentham. The publishers announce the appearance this year of an edition of his *Theory of Fictions*, uniform with the volume under review. We hope to recur to the topic in our next number.

H. A. H.

Studies in Law and Politics. By HAROLD J. LASKI, Professor of Political Science in the University of London. London: George Allen & Unwin, Ltd. 1932. 299 pp. (10s. 6d. net.)

THIS is a collection of essays and pamphlets by Professor Laski which have previously appeared in less readily accessible form. The first three essays, on 'The Age of Reason,' 'Diderot,' and 'The Socialist Tradition in the French Revolution,' are of interest to the student of political science rather than of law: in those which deal more directly with the law the lawyer must expect to find not exposition but criticism, both constructive and destructive, and mainly philosophical. Professor Laski is one of that band, turned out evidently by the American and Continental schools of law, but not noticeable among 'the general run of English lawyers,' who are 'missionaries for new ideas' and 'clamour for experiment' (p. 294). The device on their banner is social equality, their aim to admit to a fuller share in the riches of civilization 'those who have no commodity to sell save their labour' (p. 126). This aim is to be achieved through the agency of a law whose end must be the satisfaction of human demands at the maximum that is socially possible (p. 274), and by the recognition of the object of the State as the enrichment of the social heritage through the enlargement of individual personality (p. 142). This end appears to them not only morally desirable, but inevitable, and, to boot, the path of wisdom, since it is the one sure safeguard against revolution (p. 138).

This is the 'general attitude' which the author claims to underlie and give unity to these essays, whether he is advocating a Second Chamber powerless as 'the protective armament of vested interests' (The Problem of a Second Chamber), the substitution of socially valuable functions for property as the basis of rights (The State in the New Social Order), or the insulation of the judges, both before and after their appointment, from the contamination of politics (The Technique of Judicial Appointment); or whether he is demonstrating that in spite of formal democracy our system of government is still aristocratic (The Personnel of the British Cabinet, 1801—1924), that the law of constructive contempt (Procedure for Constructive Contempt) and of imprisonment for debt, along with the cost of litigation and other matters, are in need of drastic reform (Justice and the Law), or that judicial review of social policy may be undesirable (Judicial Review of Social Policy). To complete the list 'The Political Philosophy of Mr. Justice Holmes' is a warm and sympathetic tribute to the work of a truly great judge, most attractively presented, and in 'Law and the State,' the most important of these essays, Professor Laski expounds his own system of legal philosophy.

In all these essays the author exercises a commendable restraint, which makes a lapse into ranting against one law for the rich and another for the poor, on p. 283, all the more unfortunate. In excess of zeal too for reform in the teaching of law, the writer treats the Inns of Court as if they held a monopoly of law teaching. The charge that law is not taught as a science in England is not applicable to at least the older Universities, though there is substance in the view that its interrelation with economic factors should be more strongly emphasized. Not, however, to the extent which the writer would like, defining law as he does on p. 281 as 'the response to effective economic demand.' He contradicts himself, however,

when on p. 270 he admits the influence of ethical ideas on the content of law. On the other hand, unless law is made a post-graduate study, there is danger in trying to convert law schools into schools of law-reform (p. 179). This is to invite confusion in the mind of the youthful student, between what is and what ought to be the law. Even the learned author does not escape this confusion when dealing with the problem of the 'validity' of legal rules. If the term 'valid,' which is as ambiguous as the German 'Geltung,' is to be admitted, the legal validity of a rule must be carefully distinguished from its ethical or absolute validity. The latter is correctly seen to depend on the content of a rule and not on its source, but it is a mistake to suppose that 'legal theory' (whatever 'Austinian theory' may say) sees this source exclusively in the will of the State. The introduction to Allen's 'Law in the Making' should suffice to expose this error. And when, following Verdross, we are told on p. 267 that 'legal supremacy belongs to the body of rules which make up international law,' so that 'a State cannot legally will what it pleases,' it is obvious that validity in municipal law is being confused with validity according to international law, or, still worse, with validity in that sphere of absolute law which is postulated by the supporters of a monistic theory.

On the whole this volume is a forceful plea for a more 'sociological' attitude to law, on the part of teachers, the profession and the general public. But it is a pity that Professor Laski's stimulating ideas should be marred by a certain incompleteness. His net is perhaps cast too wide. He is not assisted by a number of misprints and omissions which cause one to search for non-existent errors when a passage is not clear, or by the faulty spacing of the statistical tables in essay No. 7.

B. E. K.

Le droit international public de la mer. Tome I, Introduction —La haute mer; tome II, Les eaux intérieures. Par GILBERT GIDEL. Paris: Recueil Sirey. 1932. T. I, 530 pp.; t. II, 393 pp.

THESE are the first two volumes of a new treatise by Professor Gidel, of the University of Paris and of the *École libre des sciences politiques*. They (together with a volume upon Territorial Waters which has not yet appeared) are concerned with the law of peace, and later volumes will deal with the law of war and neutrality. It is a matter of regret to us that the volumes should have come to our hands so recently, as it is impossible in the short time at our disposal to do justice to the importance of this piece of work by a critical estimate of its valuable contents.

The Introduction, consisting of 120 pages, contains definitions of *droit maritime*, *milieu marin*, and *navire*, a classification of the different *espaces maritimes*, and an examination of the terminology employed in different countries to describe or define them, a discussion of the judicial nature of a ship and the distinction between public ships and private ships, and a most useful survey of the relevant literature (including periodicals) in ten different languages. Professor Gidel then devotes eighty pages to the historical development of the conception of the freedom of the high seas

and examines at some length the controversy between Grotius and Selden. After that the author discusses the legal nature of the high seas and of ships upon them, the consequences of the rule of the exclusive competence of the flag State and the exceptions to that rule—by customary law (as to piracy and self-defence) and by treaty (as to slave-trading, submarine telegraphs and fisheries). He then examines numerous measures for the purpose of securing order and safety at sea such as the Regulations for the Prevention of Collisions at Sea, the International Code of Signals, the Brussels Conventions of 1910 as to the unification of the Rules as to Collisions and as to Assistance and Salvage at Sea, the Convention of London of 1929 for the Safety of Life at Sea, and the Radiotelegraphic Convention of Washington of 1927. Later chapters deal with the protection of *les richesses de la mer*, which includes fish, seals, whales, etc., with the legal position of sedentary fisheries, of the sub-soil under the high seas and of tunnels, and with the air space above the high seas.

The second volume, *Les eaux intérieures*, by which is meant maritime inland waters, including ports and harbours, deals with the legal nature of such waters, the rules governing admission to them, and the legal status of both public and private ships within them.

It is difficult to say which portions of these two volumes will be found the most valuable by international lawyers. Professor Gidel is a recognized authority in the field of maritime international law, and was the leading French delegate on the Commission for the Codification of the Law as to Territorial Waters which met at The Hague in 1930. In particular, his analysis of the legal condition of maritime inland waters throws much light upon a branch of the law on which little authority exists. I am aware of no volumes which deal with maritime international law in so scholarly and well documented a manner as these, and I am sure that if the gratitude of his colleagues in other countries will be any recompense to Professor Gidel upon the completion of this onerous piece of work he will feel amply rewarded.

A. D. McN.

Public Debts and State Successions. By ERNST H. FEILCHENFELD, J.U.D. Berlin, Assistant Professor Harvard Law School. New York: The Macmillan Company. 1931.

'LEGAL problems arise when a State loses a part of its citizens and assets through loss of the whole or a part of its territory.' As regards one class of such problems, namely, that relating to existing Public Debt liabilities, Professor Feilchenfeld substantiates the opening words of his Preface by an exhaustive examination of the history of particular international Public Debt settlements, upon the occasion of territorial transfers, from the middle of the sixteenth century to the Peace treaties following 1918.

Practice in these many settlements has borrowed little from relevant contemporary legal theory, be it that of Grotius or Puffendorff or, most recently, the important work of A. N. Sack. Since, however, theories as to the appropriate basis for such settlements have diverged widely, the failure of practice to conform thereto is perhaps not surprising. But

practice itself has done equally little to provide special or general rules of law capable of universal application to the problems in question. It is the exploration of the possibilities of progress in international law in this connexion that Professor Feilchenfeld has in view. He devotes the last three hundred pages of his nine hundred page treatise to a scientific consideration of various lines of approach to equitable public debt adjustments through principles of public and private law.

That the conclusion to such a discussion should be the impossibility of finding any single simple criterion, any rule of thumb, according to which substantial justice may be done in particular cases, is inevitable. But that specific tests such as 'relative paying capacity, relative importance, ascertainment of an area's own debts, determination of even settlements, consideration of odious debts and past injuries and benefits' (p. 868) should be treated not as individually decisive rival criteria, but as complementary criteria subordinate to justice as the guiding principle, is a conclusion both less obvious and more important. 'Of some of the financial settlements of the World War it may be said that their injustice might have been achieved by less complicated methods' (p. 870). If the methods suggested by Professor Feilchenfeld are no less complicated, at least their effects are not likely to be similarly perverse. Recognition of the principle that 'Justice, as distinguished from positive law, has in view not individual technical theories but fairness of total and final results' (p. 869) would effect a notable improvement in the technique of international negotiations.

If criticism of Herculean labours such as those represented by Professor Feilchenfeld's book were at all in place, it would embrace all lawyers within its scope. It would appeal to them, when attempting to deal with essentially economic matters, to look further into the economic consequences of the legal solutions to their problems. Justice can operate only within conditions set by capacity to pay, and social welfare in questions of State may deserve precedence over the ordinary conceptions of legal rights applied to relations between man and man.

M. T. H.

The Principles of Judicial Proof. By JOHN HENRY WIGMORE, Professor of the Law of Evidence in Northwestern University. Second edition. By the Author. Boston, U.S.A.: Little, Brown & Co. 1931.

If the day ever comes when the British public is convinced that a purely empirical training is not the best preparation for a forensic or judicial career, the author of the monumental treatise on Evidence will hold as honoured a place on this side of the Atlantic as he already holds on the other. In the volume just published on the subject of the principles of judicial proof he returns to the task which he undertook seventeen years ago in the first edition. This, the second edition, is substantially a new book, embodying the results of much teaching and reflection. It will be found interesting not only by lawyers but also by those interested in criminology and criminal trials, by detective story enthusiasts, and by some historians. It is copiously documented with

references to psychological and other literature, and illustrated by problems taken from reported cases. Appendix III contains a most useful list of trials which are both instructive by reason of the problems which they present and historically interesting by reason of their notoriety. Appendix IV contains a cogent plea for the application of the science of proof to history, with acknowledgment to a manual entitled 'The Historian and Historical Evidence,' by Allen Johnson, sometime Professor of American History in Yale University, published by Scribner's in 1926. Mr. Wigmore argues that although historical and judicial inquiries differ greatly as to the relative bulk of the respective kinds of evidence available for them, there are enough similarities to justify the application of a single independent Science of Proof to both. He concludes the Appendix with a list of thirty historical problems, more than half of them American, with citations of the relevant literature.

H. A. H.

Criminal Justice in England. By PENDLETON HOWARD, Professor of Law in the University of Idaho. New York: The Macmillan Co. 1931. 8vo. 409 pp. (15s.)

It is greatly to be regretted that it has not been possible to put this admirable book on the English market at a lower price than fifteen shillings, for it ought to be on the shelves of all persons concerned in local administration, as well as of many law students. Mr. Howard, who had previously had five years' experience on the staff of the District Attorney of New York County, spent more than a year studying the methods of English procedure at the expense of funds provided by the Council for Research in the Social Sciences of Columbia University. The result is a mine of information which was previously difficult to obtain because it is erroneously assumed to be generally known. We doubt, for instance, whether it would be easy to verify one of the statements presented, that many prosecutions are dropped and many inadequately prepared because of the inadequacy of the financial allowances made by the Courts to prosecutors.

The book gives a full account of the Criminal Courts, of summary jurisdiction and indictment, of police prosecutions and of the functions of the Director of Public Prosecutions. It also contains a summary comparison between the English and Continental systems, suggesting that one of the explanations of many of the differences between English and American criminal trials is the fact that under Continental influence the office of public prosecutor was introduced into the United States, and that individuals were relieved of the responsibility of instituting and conducting prosecutions. Mr. Howard thinks that the English practice is not likely to be changed because public opinion is on the whole satisfied that our criminal law works. The average citizen is not worried by the speculation whether it is fair to injured persons, or whether it would work (as it certainly would not) if social conditions were to produce a less law-abiding community.

H. A. H.

England Zivilrecht. A presentation in German of the English Civil Law, published by J. Bensheimer (Mannheim, Berlin, Leipzig). Vol. I. 711 pp. (56 RM.)

THIS is part of an ambitious work entitled *Die Zivilgesetze der Gegenwart*, *The Civil Law Systems of the Present Day*. One is filled with admiration for the energy of a company of scholars who are prepared to face so formidable an undertaking and for the courage of publishers who will finance it. Students of comparative law should note the series, which is likely to be most useful to them. The English Law Section will be completed in two volumes, with a supplement containing important statutes and extracts from leading cases.

The present volume comprises eleven sections: Sources, Equity, Conflict of Laws, Personal Property, Real Property, Conveyance and Registration, Leases, Servitudes, Mortgages and Pledges, Trusts, Succession. The authors are Herren A. B. Schwarz, S. Goldschmidt, E. Schmitz, E. von Schwartzkoppen, H. Goldschmidt, W. Langenbach, H. Dölle, R. Kohlmann, F. Pringsheim.

In a book in which there are so many citations and quotations in a foreign language the reader must expect some misprints. But the general impression which the work gives is that of accuracy and understanding. The references to cases are numerous and up to date. There is no index, but in other respects the mechanical arrangements are good.

H. A. H.

The Province of the Law of Tort. By PERCY H. WINFIELD, LL.D. (Cantab.), Hon. LL.D. (Harvard), Rouse Ball Professor of English Law, Cambridge. At the University Press. 1931. 8vo. xii and 254 pp. (12s. 6d. net.)

PROFESSOR WINFIELD'S book, containing the lectures he delivered as Tagore Professor in 1930 at the University of Calcutta, is an important and most suggestive contribution to the study of the law of Torts, and will do much to clarify the academic discussions of the subject. After a general historical account of the development of the law of civil wrongs, he proceeds to define the special characteristics of tortious liability and in a series of chapters sets out the distinctions between tort and contract, tort and breach of duties arising from bailment (we dislike the phrase 'breach of bailment'), tort and breach of trust, tort and quasi-contract, tort and crime. He then examines the relation of tort to the law of property, discusses the notion of quasi-delict, and devotes a chapter to the difficult questions arising from the application of the statutes of limitation in cases involving claims which may be maintained not only in tort but on some other ground of liability, such as breach of contract.

The chapter of the work which will probably attract most attention will be that in which the subject of Quasi-Contract is discussed. This has hitherto received scant attention from English writers, and it is probable that Professor Winfield's example will be followed by a more complete investigation of the modern law on the subject being attempted within the near future.

D. T. O.

English Law and Its Background. By C. H. S. FIFOOT, M.A., of the Middle Temple, Barrister-at-Law, Fellow of Hertford College, and Lecturer in Law at the University of Oxford. London: G. Bell & Sons, Ltd. 1932. 8vo. xvi and 279 pp. (10s. 6d. net.)

To use a phrase made popular by the writers of another book of a very different kind also coming from Oxford, this work is 'a good thing.' It is an account of the development of English law from the mediaeval period to the present day with reference to the social and political environment of the times and may be read with profit and, we may add, with pleasure (an unusual feature of a book on English law) not only by lawyers but also by the unprofessional student. In the opinion of this reviewer it is the most interesting work on English law which has been written in this generation. It teems with striking and original phrases which, while not detracting from the accuracy of the narrative, help materially to fix the attention of the reader. We cannot resist the temptation to give a few instances, but to quote at length would be unfair to the author. 'Egotism was a civic virtue and Protection the economy of a borough before it became the policy of a state' (p. 40). In speaking of Benefit of Clergy, it is described as 'the right of all literate laymen to exchange, by the simple reading of the neck-verse, the pains of capital execution for an innocuous branding of the thumb, and thus to enjoy, with the vicious dog, the privilege of a comparatively free first bite' (p. 41). In an account of the Year Books (p. 83) we read: 'Writ and pleading, process and execution, this was the mediaeval law. Principle was an academic recreation or the solace of old age.' The author must have been dozing when correcting the proof of p. 71, where *capito* is erroneously printed three times for *capite*. The same error appears in the Index. This, as far as we have been able to observe, is the only oversight, and the book as a whole gives evidence of the most careful preparation.

D. T. O.

Roscoe's Admiralty Jurisdiction and Practice. Fifth edition.

By GEOFFREY HUTCHINSON, Barrister-at-Law, formerly Scholar of Clare College, Cambridge. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1931. lxvi and 577 pp. (42s.)

THE jurisdiction of the Admiralty Court has been much enlarged by the provisions of the Administration of Justice Act, 1920, which are now consolidated in section 22 of the Judicature Act, 1925. These changes have called for a new edition of 'Roscoe,' a treatise which has no rival in its own field and is in all respects a model practice book. One often wishes that it were possible to compile a similar work dealing with the practice of the Chancery and Common Law Courts. The learned editor has seized the opportunity afforded by the new edition to deal with an important question which has loomed large in the public eye

of late, namely, the immunity enjoyed by state-owned ships. A new chapter has been added which deals solely with this matter. The present position in which governments engage in maritime trade without incurring any responsibility for damage caused by publicly-owned vessels is little short of a scandal, and Mr. Hutchinson has done a public service in calling attention once more to this aspect of international trade. In Great Britain this question is merely a part of the wider problem of proceedings by and against the Crown, but there is a need throughout the world for a drastic reform of the law which will bring it more into line with modern requirements. International action is pending, but it does not seem to be likely to become effective in the near future.

Mr. Hutchinson is to be congratulated on the skill and care which he has displayed in the important task of revising a work which is not only indispensable to practitioners, but also makes a strong appeal to those who are interested in the unification of the law of the sea.

H. C. G.

Palmer's Company Precedents. Part I (General Forms). Fourteenth edition. By A. F. TOPHAM, K.C., A. R. TAYLOUR, and A. M. R. TOPHAM, Barristers-at-Law. London: Stevens & Sons, Ltd. 1931. clvi and 1640 pp. (£3 13s. 6d.)

THERE are perhaps half-a-dozen books of precedents which are so generally recognized as supreme that every practising lawyer relies on them. *Palmer's Company Precedents* is one of these. It contains in addition to precedents a wealth of notes on many topics of company law. The present volume is the first part of a new edition incorporating for the first time the Companies Act, 1929. The companion volumes on Debentures and Winding Up will, one supposes, follow soon.

As one would expect, the work of incorporating the new law has been well and accurately done and needs no comment. One general criticism, however, may be apposite. In some of the notes the references to the newer law are so short as to be easily overlooked, and in some places where one could expect to find a point referred to there is no reference, though the point may be dealt with elsewhere. There are few cross-references and no index of statutes, and the general index, which has been cut down, does not always lead one directly to the place one wants. In these circumstances points which one knows of are sometimes hard to find, and points one does not know of may be overlooked. If cross-references were introduced more widely into the next edition, and the index was made fuller, the book would, I think, be made more valuable for those not already thoroughly acquainted with its arrangement, and a certain amount of duplication could be avoided.

May one suggest also that in the parts of the book still to be published mention be made of the date up to which the reported cases are included. The present volume appears to end at [1930] 1 Ch., though one case at least from [1931] 1 Ch. is included.

J. W. B.

The League Committees and World Order. By H. R. G. GREAVES. Oxford University Press. London: Humphrey Milford. 1931. xi and 266 pp. (14s. net.)

MR. GREAVES, of the Political Science Department of the London School of Economics and Political Science, describes his book as 'a Study of the Permanent Expert Committees of the League of Nations as an Instrument of International Government.' In a sense it is complementary to Dr. Conwell-Evans' *League Council in Action*, for it gives us an account of the non-political and less sensational activities of the League, many of which tend to escape the notice of all but specialists in the various topics dealt with by it. Among the subjects examined by Mr. Greaves are the Economic Committee, the Financial Committee (whose work met with striking success in averting the financial collapse of such countries as Austria and Hungary), the Health Committee, the Committee on Intellectual Co-operation, the Communications and Transit Committee (which has negotiated some important Conventions), and the Governing Body of the International Labour Organization (which has certainly pulled up the standard of labour conditions in many countries to something approaching the conditions prevailing in countries like Great Britain).

The author then turns to examine four specific questions: Mandates, Disarmament, Social and Humanitarian Work (such as the Protection of the Child and the White Slave Traffic), Opium and other drugs.

It is inevitable that a book of this size should in dealing with so vast a topic concern itself more with the grammar and the method of the League's technical activities than with the substance. This might have led to superficiality, but in our opinion Mr. Greaves has avoided this pitfall and has produced a useful survey of a large field and a sensible estimate of failure and achievement.

A. D. McN.

Chitty's Treatise on the Law of Contracts. Eighteenth edition.

By W. A. MACFARLANE and G. W. WRANGHAM, of the Inner Temple and the North-Eastern Circuit, Barristers-at-Law. London: Sweet & Maxwell, Ltd. 1930. ccxxxiv and 1088 pp. (45s. net.)

THE fact that this treatise has run through eighteen editions in a hundred years is proof positive of its excellence. The present editors have thoroughly revised the whole work, and all the recent cases of importance are duly incorporated. The sections dealing with infants, agents, restraint of trade and frustration have been entirely re-written, and a number of the older leading cases have been added for the first time. Chitty is one of the best manuals for the practitioner, and from the mass of decisions cited—the table of cases covers over 200 pages—some authority will be found for any point which is likely to arise, whether it be the sale of land or goods, the contract of carriage or that of marriage, or any other type of contract.

The learned editors usually give a considered opinion on cases which are somewhat difficult to reconcile, for example, at p. 177, *Stocks v. Wilson* as limited by *Leslie v. Sheill*, and we should have welcomed comment on the unsatisfactory position of infants under *Pearce v. Brain*, p. 175. They acknowledge the difficulties arising out of the *Strathcona Case*, at p. 40; the decision is difficult to reconcile with *Dunlop v. Selfridge* unless it turns upon some special distinction between ships and other chattels, or between restrictions as to user and restrictions on price maintenance. The principle of the case would appear to be unrestricted, but there are obvious reasons for placing some limitation upon it. In view of Dr. McNair's article (*ante*, pp. 125—145) the statement at p. 953, that the damages in the *Polemis Case* were for breach of contract, should be amended in the next edition.

The editors have performed a difficult task both accurately and thoroughly, and their substantial additions and re-writing make the new edition indispensable.

T. E. L.

Principles of Mercantile Law. By J. CHARLESWORTH, LL.D. (Lond.), of Lincoln's Inn, Barrister-at-Law. Second edition. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1931. xxxvi and 375 pp. (8s. net.)

THIS is a work of great merit; the leading principles are clearly and concisely stated, and illustrated by very recent cases. In selecting the authorities the maxim *Judicia posteriora sunt in lege fortiora* is very much in evidence, for example, *Hood v. Anchor Line, Ltd.*, gives way to *Thompson v. L. M. & S. Ry.* [1930] 1 K. B. 41 at p. 4; *Lever Bros. v. Bell* appears at p. 42; the House of Lords has managed to reverse the decision since this edition was published. The facts of the cases are admirably digested; accuracy, lucidity of exposition, and the absence of unnecessary verbiage are the great features of this valuable book. The new edition contains an additional chapter on bailment and pawn, and this, coupled with the incorporation of recent case law, has expanded the book by fifteen pages. It is an excellent student's text-book and a sound investment for eight shillings. In future editions, may we suggest that reference be made at p. 350 to the important case of *Winkworth v. Raven* [1931] 1 K. B. 652, on the innkeeper's liability, and to *The Winkfield* [1902] P. 42, in the section dealing with bailment? At pp. 352, 354, Halton should read Hatton, and though corrected in the Table of Cases, it does not occupy its correct alphabetical place.

T. E. L.

The English Law relating to Aliens. By WILLIAM EVAN DAVIES, LL.B., A.L.L.A. London: Stevens & Sons, Ltd. 1931. xl and 308 pp. (10s. net.)

THE author need have no doubts as to whether the law relating to aliens is of sufficient interest to justify his treatise. It is a subject of great historical interest and is of immense practical importance at

the present day, and his book does much more than 'chronicle the important legislative changes.' It is a clear exposition of the whole subject, statutes and cases, and it meets a real want. The first Book, which gives a detailed historical account of aliens in England from 600 B.C. down to the present day, shows scholarly and exhaustive research, and a mass of authorities are cited. The second Book treats with the rights, liabilities and disabilities of aliens. At p. 210 it might be stated with less hesitation that according to *Johnstone v. Pedlar* the defence of act of State is not available against an alien resident in British territory. Probably that defence might have prevailed had the Crown formally withdrawn its protection owing to Pedlar's treasonable acts. Book three is concerned with the acquisition, loss and resumption of British nationality. There are indices of cases, statutes, and authorities consulted, covering some thirty pages, but unfortunately there is no general index. The book is well written, and the author is to be congratulated upon his sound scholarly work.

T. E. L.

History of the Law of Distress for Rent and Damage Feasant.

By F. A. ENEVER, M.C., M.A., LL.D., of Gray's Inn, Barrister-at-Law. With an Introduction by Professor EDWARD JENKS. London: George Routledge & Sons, Ltd. 1931. xxxi and 325 pp. (15s.)

THIS work is a thesis approved for the Degree of Doctor of Laws at the University of London. It is a scholarly and detailed account of a comparatively untouched field of legal history. Distress is a development of the law of self-help, which was one of the earliest modes for the redress of grievances, and it is a remedy which is still in use. The efforts of the Courts and the Legislature to keep this remedy within proper limits make very interesting reading.

The history of the subject is given from the earliest records to modern times, and there is an illuminating comparison of the early principles of distress which prevailed in European countries, together with a detailed study of distress at common law, the conditions for its application, the mode of carrying it out, and the remedies for its abuse. Replevin comes in for detailed treatment, pp. 151—227, the procedure, the avowries and the replications thereto. A mass of Year Book cases has been prayed in aid, and later decisions are carefully analysed. Attention is drawn to the landlord's other remedies, and to the numerous forms of redress other than replevin which are available to the distrained tenant. The concluding chapter enumerates and explains the numerous statutory changes made in the law of distress, and the narrowing down of the extensive rights which existed at common law. We congratulate Dr. Enever upon his very learned and interesting thesis, and we hope to profit from further researches on his part in those untrodden fields of English legal history.

T. E. L.

Stroud's Judicial Dictionary. Supplement. By ELSIE MAY WHEELER. London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1931. cxii and 1036 pp. (42s. net.)

THE learned author of the *Judicial Dictionary*, who devoted his life to the accomplishment of his task, defined it as being the 'presentation of the mind of the British judges from early days . . . so far as it has been expressed on the practical meaning of the English language.' A second edition was brought out by Stroud himself in 1903, and also a Supplement incorporating judicial decisions and Parliamentary interpretations on the 'meaning of the English of affairs' up to the end of the year 1906. This present supplement supersedes the earlier one, and brings the whole work up to date.

The utility of Stroud's Dictionary is beyond question, and those who do not make a practice of constant reference to it will be well advised to reconsider their methods of research, as no other book furnishes such ready means of solving many perplexing problems. For instance, under the heading 'Customer' one will find a concise but sufficient discussion of the judicial interpretation of this term, which also acts as a signpost to the case law on the matter as it arises under section 82 of the Bills of Exchange Act, 1882.

The compilation of a dictionary is generally admitted to be an arduous task, and from the professional point of view it can hardly be regarded as remunerative. All the more credit is therefore due to Miss Wheeler for the skill and accuracy she has displayed in the rendering of a very important though, perhaps, thankless service to the legal community.

H. C. G.

The Law of Banking. By HEBER HART, K.C., LL.D. Fourth edition by the Author. London: Stevens & Sons, Ltd. 2 vols. 1931. cxxii and 1265 pp. (63s. net.)

THIS is the latest edition of a standard treatise on the law of banking which has always enjoyed a very high reputation. Drastic revision became necessary owing to the volume of legislation during recent years which has had either a direct or an indirect effect on the law regulating the transaction of business by bankers. The Law of Property Act, 1925, has, for instance, involved the re-writing of that part of the book which deals with mortgages of land as security for advances made by banks.

Banking law is a somewhat ill-defined topic which straddles over almost every other branch of the law in general, including Criminal Law. The task of authorship therefore becomes one calling for great skill in the arrangement of the text and sound judgment in the selection of the material. Mr. Heber Hart has fulfilled both requirements, and those who seek for an exposition of the law relating to financial matters cannot do better than turn to these two volumes. There is not much room for criticism, as the work has, on the whole, the merit of remarkable accuracy combined with comprehensive treatment. Perhaps one may be

allowed to grumble a little. The law of bankers' credits in its modern form has hardly received adequate consideration because the learned author has ignored the case law which is to be found in the pages of Lloyds List Reports. Some of the minor topics, *e.g.* the banker's duty of secrecy, are dealt with somewhat summarily; others are treated with what is, perhaps, excessive caution, in view of the fact that a reader is entitled to expect a certain degree of definiteness in a leading text-book of this nature. But in most instances, and in all those of chief importance, persons consulting this work will be able to ascertain all that they wish to know.

H. C. G.

Public Works Facilities Act, 1930. By F. N. KEEN, LL.B., and H. R. ASKEW, B.Sc., A.M.I.C.E., Barristers-at-Law. London: Stevens & Sons, Ltd. 1931. xvi and 176 pp. (10s. net.)

THIS admirable guide to a new statute is chiefly of interest to the expert, but it possesses two features of general interest to readers of this Journal. The Act affords a method of acquiring statutory powers alternative to procedure by Private Bill or Provisional or Confirmation Orders. A scheme made by a Minister and hurried through Parliament as an emasculated process in which First Reading, Second Reading and Committee Stage are all omitted, is a development (however limited its scope) of administrative law which should attract attention. 'Tucked away' in Part III of the First Schedule of the Act is another interesting feature to which the book draws attention. Compulsory Purchase Orders, now standardized on the lines of the method already available for housing orders, enable a Minister to authorize promoters to acquire land compulsorily. Any person aggrieved by such an order has a right, limited it is true to twenty-one days after the publication of the Minister's confirmation of the order, to make application to the High Court which is empowered to quash the order generally or in part. This, like a similar provision in the Housing Act, 1930 (section 11), is the departmental answer to judicial and other strictures passed in the recent Derby and Liverpool Housing Scheme cases. It excludes recourse to the writ of Prohibition (*R. v. Minister of Health, ex p. Davies* [1929] 1 K. B. 619), while permitting for twenty-one days only, proceedings to quash the order by certiorari (*Minister of Health v. R.* [1931] A. C. 494; cf. [1930] 2 K. B. 98).

E. C. S. W.

Notes on Perusing Titles and on Practical Conveyancing. Twelfth edition. Vol. II. By LEWIS E. EMMET, Solicitor. London: Solicitors' Law Stationery Society, Ltd. 1931. lxxx and 736 pp. (30s.)

THIS volume has been re-written to a large extent, and it follows the general scheme of the first volume as to synopses, tables of statutes and

cases, and a comprehensive index. The thirteen pages of *addenda et corrigenda* contain all the important cases to the end of September, 1931, so that both volumes are thoroughly up to date. It is a work of outstanding merit; practitioners and teachers owe a deep debt of gratitude to Mr. Emmet for his admirable treatise. His wide experience enables him to deal with those knotty points that arise in practice, and to give a well-reasoned explanation where the authorities are conflicting or do not exist at all. We have used Emmet in the lecture room and at the office, and we know no better book of its kind. Part III deals with the various parts of a conveyance; the account given of easements, and the precise effect of section 62, Law of Property Act, at pp. 69—93, is extremely useful; Chapter VII on Stamps is a mine of practical information. A comprehensive account is given of Covenants at pp. 132—236; *Fairclough & Sons, Ltd. v. Berliner* [1931] 1 Ch. 60, might, perhaps, have appeared at p. 218. Part IV deals with Wills, Personal Representatives, Trusts, Settlements and Death Duties; and Part V, dealing with Copyholds, gives all the information a conveyancer wants. There are illuminating comments on *Re Kempthorne* and *Re Newman*, and on the settled land or trust for sale controversy at pp. 380—382. Numerous very recent authorities are quoted, as well as articles in the current law journals, and nothing seems to have been omitted. Every page illustrates the author's thorough knowledge of the art of practical conveyancing, and of his ability to give clear explanations of the most difficult points.

T. E. L.

Leading Cases and Statutes on the Law of Real Property. By J. S. RABIN, LL.B. London: Sweet & Maxwell, Ltd. 1931. xiii and 440 pp. (21s.)

MR. RABIN is to be heartily congratulated upon being the first in the field with a case-book on real property containing both the old leading cases and those brought into being by the legislation of 1925. To the student it is a real boon, for the complication of facts and principles in property cases too often discourages the reading of anything beyond the headnote. Here, there is a clear statement of the essential facts, a summary of the arguments for the plaintiff and for the defendant, and a short statement of the decision, followed by well-chosen extracts from the judgments which best illustrate the principles involved. Portions of vital importance appear in heavy type.

A judicious selection has been made from the old leading cases; comments are made upon them by way of explanation and comparison wherever the Acts of 1925 have made any changes. This is extremely useful, for the student immediately grasps what the law of to-day really is. Mr. Rabin has shown considerable skill in his selection of recent cases.

The cases are dealt with under the headings of Land, Legal Estates and Interests, Equitable Interests, Mortgages, Adverse Possession and Wills. Under each heading there appear the relevant sections of the statutes dealing with the particular subject. The whole work is admirably done and will undoubtedly run to many editions.

May we suggest that in the next edition, sections 2 and 3 of the Law of Property Act, 1925, be incorporated, for they deal with one of the vital principles of the new legislation; and section 72 of the Settled Land Act, 1925, for the same reason. *Hyman v. Van den Bergh* might also appear under the easement of light.

T. E. L.

Principles of the Common Law. Originally written by JOHN INDERMAUR. Completely re-written and much enlarged by A. M. WILSHERE, M.A., LL.B., of Gray's Inn and the Western Circuit, Barrister-at-Law. Third edition. London: Sweet & Maxwell, Ltd. 1932. lxvi and 847 pp. (30s. net.)

THIS is the third edition for which Mr. Wilshire has been responsible and he has certainly enhanced the value of this standard work. The index has been made much more serviceable, a point of vital importance in a law book. The edition contains substantial alterations, much of it has been re-written and a wealth of recent cases has been incorporated. Cases of importance have not been tucked away in footnotes, but the principles are set out in the text. This must have involved immense labour, for the book deals with contract, special contracts, torts and landlord and tenant. A long acquaintance with previous editions enables the reviewer to state emphatically that the whole work has been thoroughly overhauled in a careful and accurate manner, and there is always a clear statement of principle. The new introduction is a great improvement, and *Oakley v. Lyster* [1931] 1 K. B. 148, is given the prominence it deserves.—‘The Court can give the remedy which the facts justify even if the plaintiff may have called it by a wrong name.’ Marks of thorough revision are apparent on every page, and we have failed to find omissions amongst recent cases of importance. It is up to date in every way, and includes references, *inter alia*, to *Winkworth v. Raven* (innkeeper's liability); *Fairclough v. Berliner* (relief for breach to joint lessees); *Spyer v. Phillipson* (fixtures); *Penton v. Southern Ry.* (conditions on tickets); *Blay v. Pollard & Morris* (mistake); *Jones v. G. W. R.* (proof of negligence). To candidates for the Solicitors' Final it is indispensable, and the busy practitioner will find it extremely useful.

T. E. L.

An Introduction to the History of Equity and its Courts. By HAROLD POTTER, LL.B., Ph.D., University Reader in English Law at King's College, London. London: Sweet & Maxwell, Ltd. 1931. v and 109 pp. (8s. 6d.)

IT is no small feat to have produced the History of Equity and its Courts in a little over a hundred pages. The work is well balanced,

and no important item is omitted. The numerous references to the Selden Society's publications, and the Chancery Reports, show considerable research. Like all writers on any topic of legal history, Dr. Potter acknowledges his indebtedness to Holdsworth's History of English Law. When the work under review is incorporated in the author's Introduction to the History of English Law, it may be well to enlarge the chapters on the Chancery Courts.

The general development of Equity is dealt with in five stages, and the contributions of the great Chancellors are admirably summarized. A full account is given of the various views on the origin of the *use*, and the author gives his own theory, which appears to us to be quite sound. The development of the trust is particularly well done, and the section dealing with the equity administered by the Courts of Common Law well illustrates the discretionary powers of the judges up to the fourteenth century.

The book fills a gap which has long existed in students' literature, and candidates for the Bar Final cannot do without it. One or two small errors should be corrected; p. 3, *brevium originale*, should read *breve originale*; p. 27, *become*; and p. 82, *ad usum*, not *ad usus*.

T. E. L.

Russell on Arbitrations and Awards. Twelfth edition. By V. R. ARONSON, M.A., B.C.L. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1932. lx and 751 pp. (42s. net.)

'RUSSELL' is now so firmly established as the leading work on arbitration that a new edition would not, in the ordinary course of events, call for more than a brief notice. But the present edition is of particular interest. Mr. Aronson has approached the topic from a comparative point of view, and has written a new chapter which gives a summary of the law relating to arbitration in a number of foreign countries. Commerce has now become so largely international in character, that this is a very welcome innovation, which is certain to prove of great value to practitioners. The learned editor moreover discusses with considerable acumen certain problems arising in connexion with the Arbitration Clauses (Protocol) Act, 1924, and the Arbitration (Foreign Awards) Act, 1930, which may conceivably lead to difficulty hereafter. An appendix has also been added containing the report of the Mackinnon Committee, which is still of great interest and importance, although, owing to the fact that nothing has been done since its publication in 1927, one is forced to conclude that it is not proposed to give effect to its recommendations.

Mr. Aronson is to be congratulated on the admirable manner in which he has performed his task. 'Russell' has not merely been 'spring-cleaned,' but reappears in a form in which its value is greatly enhanced to practitioners and also to laymen who are being called on with increasing frequency to adjudicate in disputes between their fellow-men.

H. C. G.

Elements of Conveyancing (with Precedents). By JOHN F. R. BURNETT, of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1932. xxxii and 544 pp. (21s.)

THE fourth edition of Deane and Spurling's *Elements of Conveyancing* appeared in 1925, at a time when the legal profession was shivering on the brink of the icy pool of irritating intricacies waiting to immerse us all in the midst of our New Year gaieties. There has been sufficient judicial interpretation of the Property Statutes of 1925 and subsequent legislation in the past six years amply to have justified a new edition, but Mr. Burnett has done much more than to bring the work up to date. Much the greater part of the book has been re-written and it contains 158 pages more than the predecessor upon which it is founded.

The subject-matter is well arranged and treated with a lucid style which should render it easy of assimilation. If one part more than another is to be singled out for praise, we would recommend the chapter on Registration of Title, which forms an unusually clear and concise summary of this somewhat complex topic.

The omission of the words 'years, granted at a rent without a fine,' from paragraph (8) on p. 403, and sub-section 2 of section 24 of the Land Registration Act, 1925, on p. 418, is unfortunate.

Elsewhere, we were surprised to find no mention of the fact that general equitable charges, restrictive covenants, equitable easements and estate contracts affecting land in the three ridings are registered in Yorkshire and not at the Land Registry, and we should have thought section 42, sub-section 4 of the Law of Property Act, 1925 (as to contracts for sale), worthy of notice, but these are but trifling defects in a work which we feel can be warmly recommended to students.

The most important of the recent decisions have been incorporated, and the selection and arrangement of the precedents at the end of the book is improved.

The format of the book is greatly improved, the size of the pages having been increased, a larger and clearer type employed, and the text set out most effectively.

R. H. K.

Annual Digest of Public International Law Cases. Years 1927 and 1928. Edited by ARNOLD D. MCNAIR, C.B.E., LL.D., and H. LAUTERPACHT, LL.D., Dr. Jur., Dr. Sc. Pol. London: Longmans, Green & Co. 1931. li and 592 pp. (42s.)

THE appearance of the first volume of this series was welcomed in Vol. IV, No. 1 of this Journal, and the hope was there expressed that the learned editors would be able to continue their novel experiment. It is pleasant to record that its success seems now assured. The reception with which it has met and evidence of the practical uses to which it is being put have determined the editors to continue the series, and we are

promised two more volumes by 1933 which will take the series back to the planned starting point of 1919. If it is to be regretted that Dr. McNair, owing doubtless to his new duties as Reader in International Law at Cambridge, will no longer be co-editor, no better successor could have been found than the new co-editor, Sir John Fischer Williams.

Since the inauguration of this series, a rival has appeared in the great work '*Fontes Iuris Gentium*,' which is being undertaken by the Berlin Institute for Foreign Public Law and International Law, under the editorship of its Director, Victor Bruns. Series A, Part I, of this work will 'show the rules of international law contained in the decisions of international tribunals'; Part II will 'include the most important decisions of the Supreme Courts of individual countries containing rules of international law.' There is one very good reason why this work should not compete with the Annual Digest. It omits to perform for the reader a service which the Digest admirably renders. Although it reports verbatim the actual decisions and opinions delivered, it never refers to the facts of a case. It is impossible, therefore, to distinguish between the *ratio decidendi* and mere *obiter dicta*. This distinction is no mere fad of English jurisprudence, but a process essential to any practical use of judicial precedents.

B. E. K.

A Digest of the Law of Agency. Eighth edition. By WILLIAM BOWSTEAD. London: Sweet & Maxwell, Ltd. 1932. cxi and 547 pp. (27s. 6d.)

THE seventh edition of this standard work on Agency appeared in 1924. The eighth edition, now published, has been revised by the learned author with reference to the cases reported to the end of the Long Vacation, 1931. Accordingly, some fifty modern decisions have been added to the wealth of authorities which the previous edition contained, and several alterations necessitated by recent legislation (chiefly the Law of Property Act, 1925) have been duly made.

Apparently no reference is made to some recent enactments, such as the Auctions (Bidding Agreements) Act, 1927, which deal only with special circumstances in particular forms of agency. This may be due to considerations of space; but it is arguable that a digest of this calibre might usefully call attention to such innovations. In particular, section 5, sub-section 3 of the Moneylenders Act, 1927, would seem worthy of mention, in that it prohibits moneylenders from employing agents to find them customers—see L. R. [1929] 1 Ch. 401—and prevents such agents from recovering any agreed commission. Moreover, a search through the Table of Cases has revealed no reference to the decision of the Court of Appeal in *James v. Smith* [1921], which, according to Charles J., is 'one of the most comprehensive decisions in relation to the sale of premises by an estate agent and the terms upon which he can gain his commission'—*Martin v. Perry* [1931] 2 K. B. at p. 315. Formerly unreported, a full note of the judgments in this case is now to be found in the Law Reports [1931] 2 K. B. at p. 317.

But, while calling attention to these few omissions, we may say that, as in the case of previous editions, this treatise remains a model of clarity and precision, and, with its numerous references to decided cases, is an indispensable part of the equipment of all who are concerned with this important subject.

S. J. B.

Leading Cases in the Conflict of Laws. By W. NEMBARD HIBBERT, LL.D. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 1931. xxi and 298 pp. (21s. net.)

WHATEVER criticisms may be made of this new work of Dr. Hibbert there is no doubt that it supplies a need long felt by students of the subject and will enormously simplify their labours. It is, indeed, a boon both to teachers and students. It furnishes a fairly comprehensive compendium of the more important cases on the subject but it is rather a misnomer to apply the term 'leading' to many of the cases in the collection. However, this does not in any way detract from its utility. The arrangement is open to some criticism but is conditioned by the fact that the work is intended as a companion to the author's text-book on International Private Law.

D. T. O.

Nullity of Marriage. By F. J. SHEED, B.A., LL.B. London: Sheed & Ward. 1931. x and 73 pp. (2s. 6d. net.)

THIS small book, which is primarily a summary of the law of the Catholic Church respecting nullity of marriage, contains some comparison with English law. The author, after giving several definitions, deals briefly with the authority of Church and State, the grounds of nullity, procedure, and the effect of nullity. In the part dealing with grounds of nullity (pp. 16—55), such as the absence of freedom to marry, the author has considered the principles of some of the leading cases. In Appendix A will be found a translation of the report of the *Marlborough Case* as decided by the Rota, the papal Court of Appeal (*Acta Apostolicæ Sedis*, 1926); while in Appendix B there are some interesting statistics in regard to petitions for nullity heard by the Rota during the years 1920—1930. A list of cases completes the volume.

H. D. H.

A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank-Notes and Cheques. By the Rt. Hon. Sir JOHN BARNARD BYLES, late one of the Judges of Her Majesty's Court of Common Pleas. Nineteenth edition, with Colonial Notes. By A. W. BAKER WELFORD, of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1931. lxxvi and 447 pp. (£1 15s. net.)

SINCE it has appeared only slightly more than a century after the original publication of Sir John Byles' treatise on the law of negotiable paper (1829), the present edition of that now classic work may be regarded as in some measure an anniversary volume. Mr. W. J. Barnard Byles, the grandson of the distinguished author, was one of the two joint editors of the sixteenth, seventeenth and eighteenth editions; but Mr. Byles died while the eighteenth edition (1923) was passing through the press, with the result that his co-editor, Mr. Welford, has made himself solely responsible for the present, the nineteenth, edition. While the long association of the family of Sir John Byles with the treatise has thus been broken by the death of one who was, in Mr. Welford's words, 'a learned lawyer, an indefatigable researcher, and, in his mastery of the law of bills of exchange, faithfully carried on the family tradition' (p. iii), it is fortunate for the profession that Mr. Welford has devoted himself to the labour of preparing this new edition. Mr. Welford was closely associated with the late Mr. Barnard Byles both in chambers and in professional work; and, being a scholar well versed in the law of bills and notes, he has produced an edition which maintains the high standard set by the author and all the previous editors. Although Mr. Welford has not changed the general character and scope of the treatise, he has continued the work of revision which was begun with the seventeenth edition (1911); and he has also re-written certain parts, more particularly the part dealing with crossed cheques (pp. 30—43). An examination of this part shows clearly that Mr. Welford has brought into the text all the important recent decisions bearing upon that subject.

H. D. H.

Colonial Admiralty Jurisdiction in the Seventeenth Century.

Royal Empire Society Imperial Studies, No. 5. By HELEN J. CRUMP, M.A., Ph.D. London: Longmans, Green & Co. 1931. xii and 200 pp. (9s. net.)

MISS CRUMP has provided us with a careful and well-documented study of the extension of the English vice-admiralty system to the colonies during the seventeenth century. Although chief attention has been devoted to the development of vice-admiralty jurisdiction in Massachusetts, Virginia, Maryland, Bermuda, and Jamaica, the history of similar jurisdictions in other colonies has not been left out of account; and, indeed, in the final chapter of the volume the history of vice-admiralty courts in India and the Far East, under the East India Company, has also been brought under review, even though, as the author

remarks, this latter development 'forms no part of the history of the imperial admiralty courts' (p. 165). Although English admiralty jurisdiction furnished the pattern upon which colonial admiralty courts, under royal charters, were founded and developed, the author has rightly stressed the point that the colonial jurisdiction was wider than that of the home tribunals (p. 152). On the special subject of prize and piracy Miss Crump's book possesses an interest comparable to those parts of Mr. C. L. Kingsford's *Prejudice and Promise in Fifteenth Century England* (Oxford, 1925) wherein he has dealt with west country piracy and the school of English seamen. Other topics in Miss Crump's book which will engage the reader's attention are wrecks, fisheries, monopolies of trade, and the enforcement of the Navigation Acts. It is regrettable that the learned author has not taken into account the results of the researches of the late Dr. Herbert L. Osgood as embodied in his classic work *The American Colonies in the Seventeenth Century* (see, e.g. Vol. II, pp. 277—308, *passim*, on admiralty jurisdiction in the later proprietary provinces).

H. D. H.

Shirley's Leading Cases in the Common Law, with Notes.
Eleventh edition. By H. BATES THOMPSON, M.A. (Oxon),
of Lincoln's Inn, Barrister-at-Law. London: Stevens &
Sons, Ltd. 1931. 720 pp. (£1 5s. net.)

SUCH is the development of the Common Law that we feel the time has come to overhaul somewhat drastically the contents of an old work of this description which is chiefly used by those preparing for professional examinations. We should welcome the disappearance of several so-called leading cases. *Cooke v. Oxley* has too long misled generations of students, though the careful footnote shows that the present editor is alive to its difficulties. *Cowan v. Milbourn* has been overruled in principle and it is scarcely enough to say so at the end of a small-type paragraph under the title of Religion. The notes to this title also overlook the Benefices Act, 1898 (Amendment) Measure, 1923. It is only by vigorous pruning that room can be found to give 'sufficient' prominence to important modern cases. For example *Sorrell v. Smith* [1925] A. C. 700, ought to have received more attention than two footnote references to the Court of Appeal decision under the title Restraint of Trade, the leading case on which, *Mitchel v. Reynolds* (1711) 1 P. Wms. 181, is not in itself a particularly useful illustration of the law in the twentieth century. The House of Lords' report in the former case does not appear to be cited at all. Yet here, if anywhere, in Lord Dunedin's judgment can the student find an intelligible exposition of the law of conspiracy.

Within the limits of strictly editorial work Mr. Thompson has made a judicious selection of 125 new cases for incorporation in the small-type text and we appreciate the difficulty of the task which confronted him. But we do not understand why he has added as one of the only two new leading cases which he contributes *Re Wilkinson* [1922] 1 K. B. 584, a case which turns upon the construction of the Unemployment Insurance Act, 1920, and is of no general interest.

E. C. S. W.

Taylor on Evidence. Twelfth edition by R. P. CROOM-JOHNSON, K.C., of the Inner Temple, and G. F. L. BRIDGMAN, of the Middle Temple and South Eastern Circuit, Barrister-at-Law. Two vols. London: Sweet & Maxwell, Ltd. 1931. cxviii and 1225 pp. (£4 4s.)

HERE is a reliable book brought up to date by competent editors. Whether it is necessary or, indeed, of the slightest practical use to add anything else is open to question; for, as a general rule, any suggestions made by reviewers with respect to these bulky and semi-authoritative treatises are consistently ignored in the next edition. Taking the risk of this, we would hint that some reference might be made to *Graigola Merthyr Co. v. Swansea Corporation* [1927] W. N. 30; and that some consistent line ought to have been observed as to the numerous decisions on the Criminal Evidence Act, 1898, s. 1 (f). Either they should have all been omitted (a footnote on p. 865 indicates Archbold for full discussion of them) or all included. As it is, one is left to guess why *R. v. Beacham* and *R. v. Walker* are included, while *R. v. Dunkley* [1927] 1 K. B. 323 and *R. v. Jones*, 39 T. L. R. 457, are excluded. We do not know whether *Taylor on Evidence* has much of a market in America, but we can assure the publishers that its chances there would be greatly improved if all references to Greenleaf were thrown overboard in favour of citations to Dean Wigmore's monumental treatise. No doubt the author of *Taylor on Evidence* based his book on Greenleaf, but be it remembered that Taylor wrote before Wigmore was born, and that his own last edition goes back to 1885.

P. H. W.

The British Year Book of International Law, 1931. Twelfth year of issue. Humphrey Milford, Oxford University Press. vi and 271 pp. (16s.)

IN the present period of doubt and scepticism those who retain their faith in International Law as a force for the improvement of world conditions will point out that behind the swift variations of international politics there is a steady growth of agreement. This is slowly building up the law of peace into a system so comprehensive that it will come to be recognized and appreciated by the ordinary citizens of all States as the greatest security for their liberties. The Sino-Japanese sensation which has attracted so much attention is, on a long view, of less moment than the quiet and popularly unnoticed progress which is being made in the development of rules which regulate the everyday intercourse of nations. The British Year Book has established a high reputation as a record of this progress, and the present volume fully maintains it. Mr. Gutteridge gives an account of the proceedings of the Geneva Conference of 1930 on the Unification of the Law of Bills of Exchange, resulting in the acceptance by the great majority of the delegations of three conventions for a Uniform Law on Stamp Duties, and on Conflicts of Laws. Dr. Lauterpacht argues that the alleged contrast between the Anglo-American and

Continental schools of thought in International Law does not at the present time exist. The work of the eleventh Assembly relating to the Permanent Court is discussed, and there are articles on the future of codification by Professor Brierly, the Court of Chancery and Recognition by Mr. Bushe-Fox, the legal nature of the Minorities Petition by Mr. Julius Stone, and the recognition of foreign laws by municipal Courts by Mr. Fachiri. There is a collection of valuable notes, and the usual sections on the decisions of international tribunals and of national tribunals involving points of International Law, while a large number of books are reviewed.

J. W. C. T.

Constitutional Law. By E. C. S. WADE and G. GODFREY PHILLIPS. London: Longmans, Green & Co. 1931. 8vo. xxii and 476 pp. (21s. net.)

THIS work supplies and, we may add, supplies in a most satisfactory way, the need that has long been felt by students and teachers alike, of a text-book giving an account of the institutions and discussing the main principles of English government at the present day within the compass of a volume of moderate size. It has quickly received recognition in all university law schools, and although the authors disclaim any attempt to produce a standard work on Constitutional Law, there is no doubt that it will become the ordinary text-book used by all students commencing the subject, and, within the limits of the material dealt with, achieve the distinction of being recognised as containing an accurate presentment of the law. The authors have wisely omitted any discussion of Offences against the State, which is more appropriate to works on Criminal Law. A very useful feature of the work is Part VI, dealing with Local Government, which is a model of conciseness without omitting, as far as we have been able to observe, anything material to the requirements of the ordinary student.

D. T. O.

The Morality of Punishment. By A. C. EWING, M.A., D.Phil. London: Kegan Paul, Trench, Trubner & Co., Ltd. 1929. (10s. 6d.)

THIS book was greatly needed. It is well and simply written and punctuated; and the writer has not fallen into the modern subterfuge of using language to conceal his thoughts, nor had he any reason to do so. It is a work that will be appreciated much more by the philosopher than by the practical lawyer, but it can do the latter nothing but good to read it.

To the moral drawbacks of punishment as used by the State, mentioned by the author, might be added the effect of punishment on the person administering it. There is not only the usual complaint of its coarsening effect, there is also the danger that punishment easily becomes

a habit. Most people have seen a mother, after some dangerous adventure, ease her own nerves by striking her child; and we have all heard of 'hanging' judges. It is this habit which causes the administrator to forget that the essential feature of punishment is the expression of disapproval, not the infliction of pain. Pain is forgotten when absent, pain as a deterrent from crime would require one huge policeman to attend each criminal.

But the wrongdoer's mind must be got into a receptive state before he will appreciate disapproval. Thieves play to please galleries of thieves, not of honest men. Punishment is not disgrace to the criminal, it is merely bad luck, and the lesson it teaches is how to avoid it in future. We have yet to meet a professional criminal who does not intend to return to his profession, with fewer mistakes, when he is released. There may be such, but their bringing up has taught them that it would be a dishonour to admit an intention to reform.

And this brings us to a conclusion. One may justify punishment on many grounds: deterrence of the criminal and of others, reformation, even retribution; but it cannot be justified on any one of them alone. Even when justified it must be a means to an end, a sharp reminder of the opinions held by honest men. But of what use is such a reminder until the criminal is prepared to consider the opinions of honest men? Little use indeed; and we submit that the real cure for crime lies much more in a wholesale clean-up of existing social, educational, and economic conditions, than in punishment. Break up the conditions which breed criminals, and crime will soon be the monopoly of abnormals.

H. B.

Les Voies d'Exécution en Droit Anglais. By JEANNE AMOUROUX-MÉNARD. Paris: Arthur Rousseau. 1930. 505 pp. (Frs. 60.)

THE paucity of treatises in any language on the enforcement of the judgments of the English Courts lends an additional interest to this clear and detailed presentation of the subject by a French lawyer. It is the latest volume in the series of studies of different topics of Anglo-American law which owes its origin to the inspiring force of Professor Lévy-Ullman and has done so much to familiarize the French legal public with the structure and characteristics of our law. When we consider that the learned authoress has been called upon to deal with the intricacies of a procedural system which has nothing in common with that of her own country, and is, indeed, often a source of bewilderment to English lawyers, it is impossible to refrain from offering a sincere tribute of admiration to the amazing industry and patience which have rendered possible the publication of a treatise which, though not strikingly original, compares favourably in width of scope and wealth of detail with most existing treatises on this subject. One can only hope that the younger generation of English lawyers may be induced by examples such as that furnished by the work now under review to explore the virgin soil of Continental law and practice.

H. C. G.

International Law in Peace and War. By AXEL MÖLLER.
Part I, Normal International Relations. Translated from
the Danish by H. M. PRATT. London: Stevens & Sons.
xxviii + 355 pp. (20s. net.)

THIS is the first volume of a book by Professor Axel Möller, of the University of Copenhagen, the English edition of which contains a Preface by Judge Frank B. Kellogg, of the Permanent Court of International Justice. The valuable characteristic of Professor Möller's book is in our opinion its bibliographical apparatus and the evidence which the text contains of the manner in which the author has examined the relevant literature, both text-books and periodicals, ancient and modern. It might be expected that a professor writing in what it has become customary since the Great War to call one of the 'neutral' countries would have a distinctive point of view, but I think that the reader of this book will be struck by the similarity of the views expressed to those which are current in Great Britain.

Mr. Pratt's translation appears to be a good one so far as a reader unacquainted with Danish can tell. English readers will be grateful for the opportunity afforded to them by Professor Möller and his translator of consulting a Danish work which contains a clear statement of principles for the most part generally accepted and a wealth of references to treaties, text-books and periodicals.

A. D. McN.

The Law of Master and Servant. By A. S. DIAMOND, M.A.,
LL.M., of Gray's Inn, Barrister-at-Law. London: Stevens
& Sons, Ltd. 1932. lxvi and 348 pp. (12s. 6d. net.)

MR. DIAMOND has adequately justified his self-imposed task of adding yet another to the many books on this well-worn subject by pointing to the rapidity of its recent development. He has been able to adopt with success the form of statements of the law followed by explanatory text and illustrations. One sphere in which the law has developed rapidly in recent years is that of covenants in restraint of trade, particularly those imposing restrictions on the covenantor's subsequent service or occupation. Appendix B contains a useful classification of a large number of cases on the subject arranged under the occupations of the parties and is supplementary to the full discussion in the text.

We have only two suggestions to make for the improvement of this useful book; (1) in these days it would be well to have separate chapters dealing with servants (*a*) of the Crown; (*b*) of local authorities; (2) the text following Article 91 should deal fully with wrongful departure by the servant—a not infrequent event, though comparatively seldom before the Courts.

E. C. S. W.

The Law of the Taxing Power in Canada. By Professor W. P. M. KENNEDY, M.A., Litt.D., and D. C. WELLS, M.A., Barrister-at-Law. Toronto: University of Toronto Press. 1931. xvi and 157 pp. (\$3.00.)

THIS monograph is of great interest as illustrating the legal problems arising from federalism. It is hardly necessary to say that it turns on the interpretation of sections 91 and 92 of the British North America Act, 1867 (distribution of powers). There is no parallel to be found in our Constitution; notwithstanding the measure of autonomy enjoyed by the larger local authorities, rating, like taxing, powers are controlled by the Central Government. It is illuminating to find that such a subject has produced a volume of case law in sixty-five years sufficient to fill nearly eight double columns in the closely printed table of cases.

E. C. S. W.

The Law relating to Trade Combinations. By A. L. HASLAM, B.C.L., D.Phil. (Oxon), LL.M. (New Zealand). With a Foreword by W. T. S. STALLYBRASS, D.C.L. London: George Allen & Unwin, Ltd. 1931. 215 pp. (10s. net.)

Labor and the Sherman Act. By EDWARD BERMAN, Ph.D. New York and London: Harper Brothers, 1930. xviii and 332 pp. (10s. 6d.)

It would be impossible in a short space to give a critical review of the closely reasoned examination to which Dr. Haslam submits the English law relating to Trade Combinations in all its aspects. Of particular interest are the chapters dealing with Liability in Tort, including the careful analysis of the House of Lords' speeches in *Sorrell v. Smith* [1925] A. C. 709, and the Problem of Trust Control, in which the law of the Dominions, the United States and Germany is discussed. The final conclusions should be closely examined. The solution has, as most people will agree, passed beyond the competency of an individualistic common law to provide. We hope that, before long, the task will be taken up where Dr. Haslam has wisely left it.

The American book by an economist contains a detailed account of the effect on labour of the famous anti-trust legislation of forty years ago.

E. C. S. W.

Elements of the Law of Contract. By W. G. H. COOK, LL.D. (Lond.), of the Middle Temple, Barrister-at-Law. Assisted by JOHN W. BAGGALLY, M.A. (Oxon), of the Inner Temple, Barrister-at-Law. London: Butterworth & Co. 1931. xxvii and 203 pp.; index, 36 pp. (5s. net.)

THE author and publishers are to be congratulated upon the accuracy and inexpensiveness of this little book. It contains a useful summary of the general law of contract, supplemented by short sections concerning negotiable instruments, agency, insurance, and kindred outlying topics. The Sale of Goods Act, though not treated as an isolated subject, is frequently mentioned incidentally in the main body of the text.

The principles are illustrated by some 150 cases, most of which are accompanied by short sketches of the relevant facts; and, although several old friends are missing from this list (*e.g. Tweddle v. Atkinson, Prested v. Garner, Cundy v. Lindsay*, and *Phillips v. Brooks*), in most cases the principles which they applied are duly noted. No reference has been found, however, to *Shadwell v. Shadwell*, *Scotson v. Pegg*, *Avery v. Bowden*, and *Polhill v. Walter*. Moreover, the words of section 4 of the Statute of Frauds are misstated on page 32, as also is the effect of section 26 of the Bills of Exchange Act on page 184.

Chapters I (offer and acceptance) and V (mistake and misrepresentation) might well be expanded in a subsequent edition; but, on the whole, the subject suffers surprisingly little from the compression inevitably associated with so small a text-book.

S. J. B.

Cases on International Law. By PITT COBBETT, M.A., D.C.L. Vol. I, Peace. Fifth edition. By FRANCIS TEMPLE GREY, M.A., of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1931. xx and 372 pp. (17s. 6d.)

'PITT COBBETT,' as this book is affectionately known, began as a case book pure and simple. Not until the third edition did the learned author add systematic notes, which undoubtedly enriched the work. But, in undertaking the fourth edition, the late Dr. Bellot was careful, in the words of his Preface, not to 'follow the evil example of the glossators of the *Corpus Iuris*' and bury 'the Leading Cases . . . under a mass of commentary.' This would be to rob Pitt Cobbett of all its special value, and anything tending to this result must be deplored. The new method adopted of printing the cases in small and the commentary in large type is therefore a step in the wrong direction, and it is to be hoped that in future editions there will be a return to the former practice.

The defects of this new edition are not only typographical. The new material which has been inserted is often far from clear. The substitution of the Palmas Island Arbitration for the Alaska Boundary Dispute is doubtless an improvement, but we are left to imply who are the parties to the dispute. In a note on the *Lotus Case*, p. 232, the list of judges omits

Judge Moore, replacing him by Caloyanni, who happens to have been the Greek national judge in the next case before the Court, the case of the Mavromattis Concessions. The case of *Luther v. Sagor*, which according to the Index should appear on pp. 37 and 346, does not appear on the latter. It ought not to appear on the former, where the recognition of States is being dealt with, but on p. 78, where recognition of Governments is being treated. These are but a few examples, which might be multiplied.

B. E. K.

Phipson on Evidence. Seventh edition by ROLAND BURROWS, K.C., LL.D., Recorder of Cambridge, assisted by C. M. CAHN, B.A., of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1931. cxc and 788 pp.

THIS work is too well known to need comment. This edition is the first which was not prepared for publication by the original author, but the present editorship is a sufficient guarantee of scholarship combined with recognition of practical requirements. No change has been made in the arrangement of the work, and there has therefore been preserved the admirable arrangement by which the decided cases falling on each side of the line of admissibility are set out in parallel columns on the same page in contrasted pairs, a great assistance to the reader whether he be practitioner or student. A comprehensive yet handy book.

J. W. C. T.

Elements of the Law of Contract. By A. T. CARTER, K.C. Seventh edition. London: Sweet & Maxwell, Ltd. 1931. xvi and 290 pp. (12s. 6d.)

IN its latest edition this sound little book well maintains its standard. It gives an excellent bird's-eye view of the subject and can be recommended to those students who desire an instrument of rapid revision, or who have not the time, inclination or need to study the larger text-books.

J. W. C. T.

The Agricultural Holdings Act, 1923, with explanatory notes and general forms. By A. J. SPENCER, M.A., of Lincoln's Inn, Barrister-at-Law. Eighth edition. London: Stevens & Sons, Ltd. 1931. xxiv and 326 pp. (12s. 6d. net.)

THIS book is very well done, and will be found most useful not only by practitioners but also by estate agents and others interested in agricultural tenancies. The first part deals with the Agricultural Holdings Act in

detail with explanatory notes and a discussion of decided cases. The second part treats of tenant right valuations, compensation for improvements, and customs of the country.

J. W. C. T.

A Selection of Cases on Equity. By SIDNEY EARLE SMITH, Dean of the Faculty of Law, Dalhousie University, and HORACE EMERSON READ, George Munro Professor of Law, Dalhousie University. Toronto: Burroughs & Co., Ltd. xiii and 685 pp. (\$9.)

THIS is a most useful Case Book of Cases in Equity for the use of Canadian law schools. It contains a large selection of English as well as Canadian Cases, and thus will be of great assistance to English law students as well as to those for whom it is primarily designed.

Guide to the Law and Legal Literature of France. Prepared under the direction of EDWIN M. BORCHARD, Professor of Law, Yale University, by GEORGE WILFRED STUMBERG, Professor of Law, University of Texas. Washington: United States Government Printing Office. 1931. (\$1.25.)

A MOST useful bibliography of French legal literature. This should be indispensable to every legal library.

The Commercial Code of Japan (Annotated). Vol. I. The Codes Translation Committee, League of Nations Association of Japan. 1931. (Price not stated.)

THIS work also will be, when completed, a necessary addition to all legal libraries.

Other books and publications received (some of these will be reviewed in the next issue):—

The Bell Yard. Being the Journal of the Law Society's School of Law. No. VII, May, 1931, and No. VIII, November, 1931. Editors: H. E. SALT, M.A., LL.B., and E. C. ROBBINS. The Law Society and the Solicitors' Law Stationery Society, Ltd.—[Articles on The Law Society's Library, by R. A. CUNNINGHAM, Librarian to the Law Society; A Poet's Lawsuit, by H. H. MARSHALL, LL.B.; Westminster Abbey and

the Law, by LAWRENCE E. TANNER, F.S.A., Assistant Keeper of Muni-ments, Westminster Abbey; William Paston, Justice, by E. C. ROBBINS; and an exhaustive review of Professor Winfield's Province of the Law of Tort, by P. A. LANDON, M.A.]

Annotated Bibliography on Disarmament and Military Questions. League of Nations Library, Geneva, 1931. Cambridge University Press Catalogue, 1932.

Theorems in Anglo-American Labor Law. By GEORGE H. JAFFIN. Reprinted from Columbia Law Review, November, 1931.

Bills of Costs. By J. E. THOMAS, LL.B. (Lond.), of Gray's Inn, Barrister-at-Law; assisted by R. G. CLARK. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1932. xii and 747 pp. (42s. net.)

Georgetown Law Journal. Vol. XIX, No. 1, 1930; Vol. XX, No. 1, 1931; Vol. XX, No. 2, 1932. Washington: Georgetown Law Journal Association.—The leading articles are Factors in the Preservation of Roman Law, by C. S. LOBINGIER; The Origin of Equity, by C. A. KEIGWIN; The Optional Clause, by W. HEPBURN; two articles on the Lex Christiana, by C. S. LOBINGIER; Diplomatic Privileges and Immunities, by N. L. HILL; The Advisory Opinion concerning the Austro-German Protocol for the Establishment of a Customs Union, by L. E. CASSIDY; Edicts of the Emperor Augustus discovered at Cyrene, by M. R. P. McGUIRE; and the Unauthorized Use of Photographs, by J. R. FITZPATRICK.

World Unity. Vol. VIII, 1931. (35 cents.).—This contains articles of an international character on Unemployment, Armaments, and Chambers of Commerce.

The Mixed Arbitral Tribunals. An experiment in Legal Procedure. A Reading delivered before the Honourable Society of the Middle Temple by HEBER L. HART, K.C., LL.D., late British Member of the Mixed Arbitral Tribunals. 1932. Pitman & Sons, Ltd. 19 pp. (2s.)

The Permanent Court of International Justice. A Reading delivered before the Honourable Society of the Middle Temple, by SIR CECIL HURST, G.C.M.G., K.C.B., LL.D., Judge of the Permanent Court of International Justice. 1931. Solicitors' Law Stationery Society, Ltd. 18 pp. (2s.)

Gaynor. The Tammany Mayor who swallowed the Tiger. By L. H. PINK. 1931. New York: The International Press, 167th Avenue. 256 pp. (\$2.75.).—A very interesting biography of Gaynor, the 'judge, lawyer and philosopher.'

Tulane Law Review. Vol. V, No. 4, 1931—Pan-American Number.—The leading articles are The American System on the Conflict of Laws and their Reconciliation, by A. S. DE BUSTAMENTO; The Integral Unification of American Civil Law, by F. COSENTINI; Elements of Peruvian Commercial Law, by R. D. MOORE; Vol. VI, No. 1, 1931, No. 2, 1932, Jottings on Comparative Legal Ideas, by J. H. WIGMORE; The Progress

of Comparative Law, by W. HUG.; The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana, by H. C. VOSS; and two forms of Tortious Liability in Modern Chinese Law, by J. C. H. WU.

The Interstate Commerce Commission. A study in administrative law and procedure. By I. L. SHARFMAN, Professor of Economics in the University of Michigan. Part I, 1931. New York Commonwealth Fund. xvi and 317 pp. (\$3.50.)

Temple Law Quarterly. Vol. V, No. 3, 1931. Two leading articles of importance to English lawyers are Methods of Communicating and Negotiating Agreements with Unrecognized Governments, by N. D. HOUGHTON; and Multi-Partite Aerial Agreements, by W. M. GIBSON.

Philippine Law Journal. Vol. XI, No. 1, 1931.

The Church and English Life. Sermons by the RIGHT REVEREND BERTRAM POLLOCK, D.D., K.C.V.O., Lord Bishop of Norwich. 1932. Longmans, Green & Co. 158 pp. (4s. 6d. net.)

Soviet Administration of Criminal Law. By J. ZELITCH, LL.M., of the Philadelphia Bar. University of Philadelphia Press. Oxford University Press. 1931. xix and 418 pp. (28s. net.)

Solon, or the Price of Justice. By C. P. HARVEY. London: Kegan Paul, Trench, Trubner & Co., Ltd. 1931. 103 pp. (2s. 6d. net.)

Lawrance's Deeds of Arrangement and Statutory Compositions and Schemes, with Precedents. Tenth edition. By SYDNEY E. WILLIAMS, of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1931. xi and 259 pp. (12s. net.)

Testamentary Annuities considered from the point of view of executors and trustees. By MICHAEL BOWLES, of Gray's Inn and the Inner Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1931. xxvii and 148 pp. (7s. 6d. net.)

Roman Law in a Nutshell, with a selection of questions set at Bar Examinations. By MARSTON GARSIA, B.A., of the Middle Temple and South Eastern Circuit, Barrister-at-Law. Second edition. London: Stevens & Sons, Ltd. 1931. 96 pp. (4s. net.)

The Law Relating to Restraint of Trade. By R. YORKE HEDGES, LL.M., of Gray's Inn and the Northern Circuit, Barrister-at-Law, Senior Lecturer in the Victoria University of Manchester; with an Appendix of Precedents by PROFESSOR R. A. EASTWOOD, LL.D., of Gray's Inn and the Northern Circuit, Barrister-at-Law. London: Pitman & Sons, Ltd. 1932. xviii and 121 pp. (7s. 6d. net.)

'Law Notes' Year Book, 1932.

An Alphabetical Digest of the Chief Statutes, Rules, Orders and Cases for the Year 1931. By the editors of 'Law Notes.' 8vo. xxviii and 197 pp. (7s. 6d. net.)—A most useful annual publication for law students.

In Difesa Dei coniugi Dante E Sara Majorana Innanzi Alla Corte Di Cassazione. Estratto dalla Giustizia Penale. Citta Di Castello: Soc. Anon. Tipografica 'Leonardo Da Vinci.' 1931.

The Peace-Treaty of Trianon. An appeal by the Lawyers, Judges and Professors of Law of Hungary to the Lawyers of all civilized nations. Printed by Stephaneum Co., Ltd., Budapest. 1931.

Mischiefs of the Marriage Law. An Essay in Reform. By J. F. WORSLEY-BODEN, M.A., D.Litt. Williams & Norgate, Ltd. 1932. 427 pp. (£1 1s. net.)

A Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities. By SIR M. D. CHALMERS, K.C.B., C.S.I. Tenth edition, by ANDREW DEWAR GIBB, LL.B., of Gray's Inn, Barrister-at-Law, Advocate of the Scottish Bar. London: Stevens & Sons. Ltd. 1932. li and 501 pp. (£1 5s. net.)

